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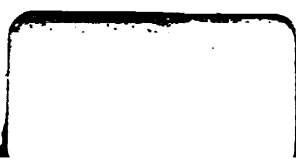
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REPORTS OF CASES

ADJUDGED IN THE

HIGH COURT OF CHANCERY,

BY

THE VICE-CHANCELLOR SIR JOHN STUART.

BY

J. W. DE LONGUEVILLE GIFFARD

(OF THE INNER TEMPLE),

ESQUIRE, BARRISTER-AT-LAW.

VOL. IV.

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LORD ROMILLY		<i>Master of the Rolls.</i>
SIR JAMES LEWIS KNIGHT BRUCE	}	<i>Lords Justices.</i>
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SIR WILLIAM PAGE WOOD		
SIR ROUNDELL PALMER		<i>Attorney-General.</i>
SIR ROBERT COLLIER		<i>Solicitor-General.</i>

A TABLE

OF THE

NAMES OF THE CASES REPORTED

IN THIS VOLUME.

	PAGE
Adams, Elsey <i>v.</i> - - - - -	398
Adams, Shafto <i>v.</i> - - - - -	492
Adams <i>v.</i> Sworder (Bankruptcy—Composition—Incapacity to Sue) - - - - -	287
Allen, Coppard <i>v.</i> - - - - -	497
Alt <i>v.</i> Alt (Consent to Marriage on Faith of Promise to Settle Wife's Property) - - - - -	84
Attorney-General, Bevan <i>v.</i> - - - - -	361
Attorney-General <i>v.</i> The Tewkesbury and Malvern Railway (Injunction—Company bound by Deposited Plans—73 s. of Railway Clauses Act) - - - - -	333
Baldwin, Edwards—Wood <i>v.</i> - - - - -	613
Bank of Wales, Croskey <i>v.</i> - - - - -	314
Bargent <i>v.</i> Thomson (Forfeiture for Nonrepairs—Injunction)	473
Baring, Trail <i>v.</i> - - - - -	485
Bascombe, Pelly <i>v.</i> - - - - -	390
Bate, Rhodes <i>v.</i> - - - - -	670

	PAGE
Bayley v. Williams (Pressure—Compounding a Felony—Security void) - - - - -	638
Bedborough, Depree v. - - - - -	479
Beeston v. Marriott (Company and Contractor—Chattels taken in Execution) - - - - -	436
Bevan v. The Attorney-General (Will — Demonstrative Legacies—Deficiency of Fund) - - - - -	361
Bonser v. Bradshaw (Costs a Charge on Estate Recovered—Infant Heir-at-Law) - - - - -	260
Bowie, Selby v. - - - - -	300
Bradshaw, Bonser v. - - - - -	260
Brown, Shepard v. - - - - -	208
Bull, Pratt v. - - - - -	117
Burn, Kemp v. - - - - -	348
Burkinshaw, Turner v. - - - - -	399
Carew v. Cooper (Assignment of Military Pension—Indian Army—46 Geo. 3, c. 69; 47 Geo. 3, c. 25) - - -	619
Charlton v. Coombes (Demurrer by Solicitor—Confidential Communication—Fraud) - - - - -	372
Charlton v. Coombes (Fraud by Wife—Husband assenting party liable for) - - - - -	382
Clark v. Clark (Administration—Wills Act—Edels v. Johnson, 1 Giff. 29; Pearmain v. Twiss, Giff. 130, observed on) -	
Clarke v. Mackintosh, Mackintosh v. Clarke (Specific Performance—Misrepresentation) - - - - -	134
Clay, Swainston v. - - - - -	187
Cooke, Williams v. - - - - -	343
Coombes, Charlton v. - - - - -	372
Coombes, Charlton v. - - - - -	382
Cooper, Carew v. - - - - -	619
Cooper v. Gostling (Conveyance by Married Woman to Company—Section 7 of Lands Clauses Consolidation Act) -	449
Coppard v. Allen (Inspector—Breach of Trust—Costs) -	497
Corporation of Bradford, Slee v. - - - - -	262
Cresswell v. Dewel (Wife's Chose in Action—Payment to Husband—Breach of Trust) - - - - -	460

	PAGE
Croskey v. The Bank of Wales (Demurrer—Bill by one Shareholder on behalf of others alleging Fraud—Payment on Allotment not a Call) - - - - -	314
Daniel, Gibbs v. - - - - -	1
Davies v. Davies (Parental Influence—Gift set Aside) -	417
Depree v. Bedborough (Vendors and Purchasers—Forfeiture of Deposit) - - - - -	479
Dewell, Cresswell v. - - - - -	460
Edwards-Wood v. Baldwin (Mutual Payments—Hotel-keeper's Bill—Account in Equity) - - - - -	613
Elsay v. Adams (Injunction—Office Copies—Affidavit in Court)	398
Eno v. Tatham (Will—"Contrary Intention"—17 & 18 Vic. c. 113—Woolstencroft v. Woolstencroft, 3 Giff. 263, 2 De G. J. & F. 347) - - - - -	181
Fernie, Young v. - - - - -	577
Finch, Thornton v. - - - - -	595
Fooks, Strange v. - - - - -	408
Gibbs v. Daniel (Solicitor and Client—Purchase Set Aside—Pressure) - - - - -	1
Gardner, Gurnell v. - - - - -	626
Gostling, Cooper v. - - - - -	449
Great Western Railway Company, Mackintosh v. - - - - -	683
Gregory, Jones v. - - - - -	468
Gurnell v. Gardner (Lien—Parol Authority to Sell Chattels)	626
Headland, Williams v. - - - - -	505
Heath v. Lewis (Divorce—Separate Estate—Right of Children)	665
Hemings v. Pugh (Demurrer—Principal and Agent—Account—Phillips v. Phillips, 9 Hare, 471; Dinwiddie v. Bailey, 6 Vea. 136, considered) - - - - -	456
Hoare's Trusts, <i>Re</i> ; Trustee Relief Acts, <i>Re</i> (Marriage Settlement—Approval of Draft by Husband—Covenant to Settle After-acquired Property) - - - - -	254
Holden v. Ramsbottom (Will—Bequest of Plate—Silver and Plated Service) - - - - -	205
Hughes's Trusts (Settlement—After-acquired Property of Wife—Graftey v. Humpage, 1 Beav. 46, followed) - - - - -	432

	PAGE
Johnson, Smith <i>v.</i> - - - - -	632
Jones <i>v.</i> Gregory (Demurrer to Bill by Heir-at-law to set aside Will devising Real Estates on the Ground of Fraud) -	468
Jones, Merryweather <i>v.</i> - - - - -	509
Kemp <i>v.</i> Burn (Trustees ordered to pay Costs—Refusal to Account)- - - - -	348
Lacon <i>v.</i> Liffen (Bankruptcy—Order and Disposition— Advance to Secure Antecedent Debt—Equitable Interest in Ships) - - - - -	75
Lancashire and Yorkshire Railway Company, Wrigley <i>v.</i> (Deposited Plans—Injunction) - - - - -	352
Lawford, Samuda <i>v.</i> - - - - -	42
Ley, Price <i>v.</i> - - - - -	235
Lewis, Heath <i>v.</i> - - - - -	665
Lewis, O'Brien <i>v.</i> - - - - -	221
Lewis, O'Brien <i>v.</i> - - - - -	396
Liffen, Lacon <i>v.</i> - - - - -	75
Light, Scammel <i>v.</i> - - - - -	127
Lodge <i>v.</i> Pritchard (Partnership—Joint Debts—Separate Estate of Partners—Costs) - - - - -	294
London, Brighton, and South Coast Company, Phillips <i>v.</i> -	46
London, Chatham, and Dover Railway Company, Russell <i>v.</i> -	403
Lonsdale, Prideaux <i>v.</i> - - - - -	159
Mackintosh, Clarke <i>v.</i> - - - - -	134
Mackintosh <i>v.</i> Great Western Railway Company - - -	683
Malherbe, Simpson <i>v.</i> - - - - -	707
Marriott, Beeston <i>v.</i> - - - - -	436
Meredith, Sweet <i>v.</i> - - - - -	207
Merryweather <i>v.</i> Jones (Bill by Divorced Wife—Settlement —Infant) - - - - -	509
Nickson, Parker <i>v.</i> - - - - -	311
Nickson, Parker <i>v.</i> - - - - -	306
O'Brien <i>v.</i> Lewis (Solicitor and Client—Professional Relation —Gift—Account) - - - - -	221
O'Brien <i>v.</i> Lewis (Solicitor's Lien for Costs) - - -	396

Parker v. Nickson (Amendment—Inconsistent Case—Motion to take Bill off File—Costs)	- - - -	311
Parker v. Nickson (Demurrer—Insufficient Allegation of Title)		306
Patch v. Ward (Demurrer—Opening Foreclosure Decree as to One Party)	- - - -	96
Pelly v. Bascombe (Entry by Stranger on Infant's Lands—Statute of Limitations)	- - - -	390
Phillips v. The London, Brighton, and South Coast Railway Company (Permanent Diversion of Public Roads—Injunction)	- - - -	46
Pratt v. Bull (Order of Probate Court not a Charge on Land)		117
Price v. Ley (Mutual Mistake—Contract Rescinded—Evidence, Parol)	- - - -	235
Prideaux v. Lonsdale (Marriage Settlement, Nature of, not Understood by Wife—Fraud on Marital Right—Acquiescence)	- - - -	159
Pritchard, Lodge v.	- - - -	294
Pugh, Heming v.	- - - -	456
Ramsbottom, Holden v.	- - - -	205
Ramsden, Thornton v.	- - - -	519
Round, Wilson v.	- - - -	416
Russell v. The London, Chatham, and Dover Railway Company (Motion for Injunction by Defendants Refused)	-	403
Rhodes v. Bate (Professional Advice—Undue Influence—Mortgage)	- - - -	670
Samuda v. Lawford (Specific Performance—Decorative Repair—Compensation)	- - - -	42
Saunders's Estate, <i>Re</i>; Saunders v. Watson (Felony—Voluntary Settlement on Wife invalid against Crown)	-	179
Scammell v. Light (Demurrer—Bill for Account against Committee—Jurisdiction in Lunacy)	- - - -	127
Seaton v. Staniland (Bill to Rectify Lease of Infant's Property—Demise too Comprehensive)	- - - -	61
Seed, Wroe v.	- - - -	425
Selby v. Bowie—(Sale—Trustee—Costs)	- - - -	300

	PAGE
Sibley, Wilkins <i>v.</i> - - - -	442
Simpson <i>v.</i> Malherbe—Collusive Bill—Concealed Purpose -	707
Settled Estates Acts, 1854 and 1856, <i>Re</i> (Sale under—Subsale at Improved Price—Practice) - - - -	90
Shafto <i>v.</i> Adams (Settlement by Expectant Heir) - -	492
Shepard <i>v.</i> Brown (Demurrer—Discovery—Account—Juris- diction in Equity—Phillips <i>v.</i> Phillips, 9 Hare, 471 -	208
Shuttleworth's Estates Act, <i>Re</i> Blackburn Railway Amalga- mation Act, Lancashire and Yorkshire Railway Company, and the Lands Clauses Consolidation Act - -	87
Slee <i>v.</i> Corporation of Bradford (Local Board of Health— Local Government Act—Delegation of Powers to Com- mittee—Approval of Plans) - - - -	262
Smith <i>v.</i> Johnson (Copyright—Separate Publication, 5 & 6 Vic. c. 45, s. 18) - - - -	632
Strange <i>v.</i> Fooks (Principal and Surety—Loss of Security— Discharge of Surety <i>pro tanto</i>) - - - -	408
Swainston <i>v.</i> Clay (Bankruptcy — Order and Disposition— Money Advanced on Ships) - - - -	187
Sparrow, Taylor <i>v.</i> - - - -	703
Staniland, Seaton <i>v.</i> - - - -	61
Sweet <i>v.</i> Meredith (Specific Performance—Decree for Default Contract rescinded—Costs) - - - -	207
Sworder, Adams <i>v.</i> - - - -	287
Tatham, Eno <i>v.</i> - - - -	181
Taylor <i>v.</i> Sparrow (Custody of Title Deeds—Tenant for Life)	703
Tewkesbury and Malvern Railway Company <i>v.</i> Attorney General - - - -	333
Thompson <i>v.</i> Bargent - - - -	473
Thornton <i>v.</i> Finch (Judgment—Equity of Redemption— Schedule 27 & 28 Vic. c. 112) - - - -	505
Thornton <i>v.</i> Ramsden (Landlord and Tenant—Building Leases —Improvements—Pilling <i>v.</i> Armitage, 12 Ves. 78, con- sidered) - - - -	519
Trail <i>v.</i> Baring (Insurance Company—Misrepresentation) -	485

TABLE OF CASES.

xi

PAGE

Turner v. Burkinshaw (Principal and Agent—Accounts— Production of Documents) - - - -	399
Ward, Patch v. - - - - -	96
West v. West (Will—Vesting Condition—Booth v. Booth. 4 Ves.) - - - - -	399
Wetherell v. Wetherell (Will—Gift by Implication—Annuity —Claim to Dower—Forfeiture—Election) - -	51
Wilkins v. Sibley (Trustee—Breach of Trust—Trustee's Share in Trust Fund liable to make good Deficiency) -	442
Williams, Bayley v. - - - - -	638
Williams v. Cooke (Equity to Settlement out of Proceeds of Real Estate—Mortgage by Husband and Wife) - -	-
Williams v. Headland (Indemnity to Executors) - -	505
Wilson v. Round (Charging Order as to Costs) - -	416
Wrigley v. The Lancashire and Yorkshire Railway Company (Injunction—Deposited Plans—Boundary Line of Land described undefined—Book of Reference) - -	352
Wroe v. Seed (Misconduct of Executors—Costs of Suit) -	425
Young v. Fernie. (Patent—Construction of Specification— Distinction between Mechanical and Chemical Dis- coveries) - - - - -	577

REPORTS OF CASES

ARGUED AND DETERMINED

IN THE

High Court of Chancery.

1862-3.

GIBBS *v.* DANIEL.

1862.

Jan. 8, 20, 21,
23, 24, 25, 28.

May 3.

THIS bill was filed by T. W. Gibbs, builder, of Clifton, and his three daughters, Mary B. Gibbs, Ann Gibbs, and P. D. Robjont, and Florence Elizabeth his wife, against Edward Daniel and Alfred Cox, solicitors, for the purpose of having set aside a purchase by the defendants of the equity of redemption in certain building land near Clifton, on the ground that it was made during the continuance of the professional relation, and also on the ground of pressure and undervalue.

By his marriage settlement, dated the 9th of June, 1823, Thomas Washer Gibbs, one of the plaintiffs, and his wife (since deceased) were entitled to a life interest in various sums of trust money amounting to the sum of about 1230*l.*; his three daughters, and his son William Kinton Gibbs were entitled to shares in the reversion of the same after his death.

Upon the 7th of February, 1835, the trustees of the

A purchase by solicitors of the equity of redemption of their client's property set aside, although another solicitor had been called in, and the defendants had ceased to act as solicitors just before the contract for purchase: it appearing that the other solicitor had, with the knowledge of the defendants, not properly discharged his duty, and that the defendants had concealed from him an important fact.

The intervention of another solicitor or adviser who, with the knowledge of the purchaser, neglects or does not properly discharge his duty, is not sufficient to support a purchase by a solicitor from his client.

1862.
 GIBBS
 v.
 DANIEL.
 Statement.

settlement advanced to T. W. Gibbs the sum of 1230*l.* out of the trust fund, on having such sum secured to them by mortgage, dated the same day, of certain property belonging to T. W. Gibbs, at Bishops' Lydeard, Somerset.

On the 7th of May, 1840, Mr. Gibbs was adjudicated a bankrupt, and obtained his certificate in the September of the same year.

By an indenture dated the 15th of June, 1841, made between his assignees in bankruptcy of the one part, and the bankrupt of the other part, in consideration of the sum of 300*l.* paid by the latter to his said assignees, they assigned to him all the life interest which at the time of his bankruptcy he possessed in the said trust sum of 1230*l.*, and all the interest of the assignees therein; and also the equity of redemption in the property at Bishops' Lydeard.

Some time before the year 1845 or 1846, Mr. Gibbs sold the property at Bishops' Lydeard, and the surviving trustee of the settlement received the 1230*l.* trust money secured thereon; but the trustee subsequently from time to time lent the whole of it back to him.

On the 17th of July, 1847, T. W. Gibbs purchased from the Rev. J. H. Sweet certain property called Harding's Paddock, situate near Durdham Down, Clifton, for the sum of 500*l.* or thereabouts, which money (it was alleged) formed part of the 1230*l.* trust fund so lent to him.

The property, of which the purchase was now sought to be set aside, called Amoury Close, also situate near Durdham Down, Clifton, and adjoining Harding's Paddock, was purchased by T. W. Gibbs from the Rev. J. H. Sweet in 1848, in consideration of 495*l.* and was conveyed, as the plaintiffs alleged, in pursuance of an agreement, to John Pring, the surviving trustee of the settlement, to be held by him (with Harding's Paddock and other property since sold) in trust for T. W. Gibbs and

his children by way of security for the trust moneys of the said settlement. Accordingly, by an indenture dated the 20th of March, 1848, the leasehold premises held on lives called Amoury Close, were assigned to the said John Pring; the purchase-money being paid by T. W. Gibbs, partly out of his own moneys and partly by moneys raised on mortgage in the following manner.

By a deed of the 27th of March, 1848, and made between John Pring of the one part, and Christopher James Thomas of the other part, the leaseholds called Amoury Close were mortgaged by T. W. Gibbs to the Bristol Building and Investment Society; and by another deed of the 15th of May, 1848, between the same parties, the same premises were further charged to secure a further sum and interest. On the 19th of December a third indenture (a second further charge) was executed between the same parties, and indorsed on the deed of the 15th of May.

The plaintiff, T. W. Gibbs, alleged that by an indenture dated the 18th of July, 1850, he conveyed Harding's Paddock (except a small portion) to John Pring in fee for a nominal consideration, no money having passed, although the consideration was stated to be 495*l.*; and that by another deed, dated the following day, the said John Pring granted the same to William Kinton Gibbs (the son of T. W. Gibbs), in lots for building purposes, the ground-rents in fee being reserved to John Pring. These ground-rents were from time to time all sold, and the proceeds received by T. W. Gibbs.

Four days subsequently a declaration of trust (exhibited in the cause) was signed by John Pring, dated the 22d of July, 1850, whereby he declared that he held the equity of redemption in the said leasehold on lives, called Amoury Close, together with the small remaining portion of Harding's Paddock and other property since sold, upon trust for the said T. W. Gibbs and his chil-

1862.
GIBBS
v.
DANIEL.
Statement.

1862.

GIBBS

v.

DANIEL.

Statement.

dren, and as security to himself for the said trust sum of 1230*l.*, the whole of which had been advanced to T. W. Gibbs.

On the 5th of July, 1851, the leasehold property called Amoury Close was made subject to a third further charge.

The moneys raised by the deeds of mortgage and further charge of the 27th of March, 1848, the 15th of May, 1848, the 19th of December, 1848, and the 5th of July, 1851, amounting together to 1400*l.* (and further secured by three policies effected by Mr. Gibbs in the Scottish Union Office, on the life of Miss Hounsell, one of the lives on which the leaseholds were held) were paid to T. W. Gibbs, and applied by him partly in paying the residue of the purchase-money for Amoury Close, and the costs and expenses, and partly in erecting houses and buildings on Amoury Close. The calls and monthly payments on the mortgage and charges and the premiums on the policies were paid by T. W. Gibbs, on behalf, as he alleged, of himself and his children.

In September, 1851, Amoury Close and the three policies of assurance were transferred by John Pring into the name of the plaintiff Mary Bryant Gibbs, on the understanding, as the plaintiffs alleged, that she was to hold the same for the benefit of her father for his life, and after his death for herself and the other children, by way of security for the said trust moneys. In the deed of transfer, dated the 23rd of September, 1851, 100*l.* was stated to have been paid by Mary B. Gibbs by way of consideration, but this sum was alleged to have been merely nominal. On the 1st of August, 1852, a part of Harding's Paddock was conveyed by William Kinton Gibbs to the plaintiff Ann Gibbs, to be held by her, as the plaintiff alleged, on the like understanding.

In the beginning of the year 1852, T. W. Gibbs (as the plaintiffs alleged, on behalf of himself and his chil-

dren) entered into a treaty with the Dean and Chapter of Bristol, under the 14 & 15 Vic. c. 104, for the purchase of the reversion in fee of Amoury Close, and with that view the property was valued in March, 1852, by a Mr. Horwood, a surveyor at Bristol, as freehold building land, at the sum of 6000*l*.

1862.
 GIBBS
 v.
 DANIEL.
 —
Statement.

On the 6th of August, 1862, the mortgage debt of 1400*l*. was transferred by the building society to the Rev. William Vassall, who was a client of the defendants Messrs. Daniel & Cox, and, to secure the same and interest at five per cent., the premises called Amoury Close were, by deed of that date, also conveyed by Mary B. Gibbs to the said William Vassall; and the three policies were also assigned to him by way of collateral security, the premiums being still to be paid by the plaintiff T. W. Gibbs.

On the 8th of September, 1853, a renewed lease of Amoury Close was granted by the Dean and Chapter to Mary B. Gibbs, as it was alleged, to be held by her on the understanding before stated.

On the 26th of January, 1854, part of Harding's Paddock, on which two houses, now known as 7 and 8, Wellington Park Villas, were then erected or in process of construction, was conveyed by Ann Gibbs to Mrs. Ann Vassall, to secure the sum of 500*l*. and interest, which sum of 500*l*. was to have been held, as alleged, for the benefit of T. W. Gibbs for life, and after his death of the other children, but was advanced to T. W. Gibbs.

By an indenture of the 11th of September, 1854, in consideration of the sum of 800*l*. therein stated to have been paid by the plaintiff Mary Bryant Gibbs, the reversion in fee expectant on the lease of the 8th of September, 1853, in Amoury Close, was conveyed to and to the use of Mary B. Gibbs and her heirs for ever.

By an indenture dated the 16th of September, 1854,

1862.
GIBBS
v.
DANIEL.
—
Statement.

Mary B. Gibbs granted to John Warren and his heirs eight lots of building ground, part of Amoury Close, reserving the rents of 4*l.* 10*s.* per lot on four, and on the other four the rents of 3*l.* each lot. By another indenture, dated the following day, Mary B. Gibbs granted four other lots of the said Amoury Close in fee to Joseph Munn and his heirs, reserving ground-rents of 4*l.*, 4*l.* 10*s.*, 3*l.*, and 3*l.* respectively; and on the next day, by a third indenture, she granted four other lots of the same close to the plaintiff Ann Gibbs and her heirs, now known as 2, 3, and 4, Wellesley Place, and a fourth plot, subsequently known as No. 3, Douro Place, but reserving ground-rents of 4*l.* 10*s.* on the first three, and of 3*l.* on the last.

Part of the small remaining portion of Amoury Close, worth about 60*l.*, was sold; and the remainder, of the value of about 30*l.*, was retained by Miss Gibbs.

By an indenture of mortgage, dated the 19th of September, 1854, executed the 22nd of January, 1855, certain other parts of Amoury Close, together with the messuages and cottages thereon, were conveyed by Mary B. Gibbs unto and to the use of the said William Vassall and his heirs, with a proviso for redemption on repayment of 1400*l.* and interest; by another indenture of mortgage, dated on the same 19th of September, 1854, but not executed until the 7th of November, 1855, the ground-rents reserved by the indentures of grant of the 16th, 17th, and 18th of September, 1854, and all the remaining portion of the premises (except a small part worth about 60*l.*) were conveyed by Mary B. Gibbs to and to the use of Miss M. M. Cox, with a proviso for redemption on repayment of 1000*l.* and interest.

Messrs. Daniel & Cox transacted the whole business connected with the above lease, renewal, purchase of reversion, grants, and mortgages on behalf of the plaintiff.

On the 10th of September, 1855, the defendants wrote to Mr. Gibbs as follow:—

“Mr. Sweet has sent requesting payment of several sums due for insurance, amounting to 6*l.* 19*s.* 10*d.*, and unless paid forthwith the policies will be avoided. Miss Cox has written for her interest, and indeed we are quite tired of the unsettled state of matters; pray come at once and put things on a footing which may save you and ourselves so much trouble.”

On the 21st of September they again wrote as follows:—

“Notwithstanding our last letter to you, we found from Mr. Sweet yesterday that you had not paid the insurance premium, and we were compelled to do so, and you have not thought fit to see us on the subject. It is utterly impossible that we can go on in this manner, and unless you can put matters on a better footing we must look into the business with a view to a final settlement of all your affairs.”

The bill alleged that Amoury Close and the two houses on part of Harding's Paddock were held by Mary Bryant Gibbs and Ann Gibbs in trust for their father and his children; and that the defendants, being employed as solicitors as above stated, were well aware of this fact. The defendants, by their answer, alleged that they believed that by a deed of release, dated the 26th of January, 1854, Mr. Pring was released by T. W. Gibbs and his children from all claims under the settlement. This release, which was put in evidence in the cause, was dated the 26th of January, 1854, and made between the plaintiff T. W. Gibbs and his three daughters of the one part, and the said John Pring the younger of the other part, reciting that all the children had attained twenty-one, and that Pring had invested the trust sum of 1230*l.* in the purchase of land, and in partly erecting villas

1852.
GIBBS
v.
DANIEL.
Statement.

1802.
GIBBS
v.
DANIEL.
—
Statement.

thereon, in Wellington Park Road, Clifton, numbered 5, 6, 7, 8, 9, 10, 15, and 16; and that, in order to complete the said villas, he had likewise raised 500*l.* on Nos. 5 and 6, the like amount on Nos. 7 and 8, the like on Nos. 9 and 10, and the like on Nos. 15 and 16, all by way of mortgage; and that he had conveyed Nos. 5 and 6 to Mary Bryant Gibbs, also 7 and 8 to Ann Gibbs, 9 and 10 to Florence Elizabeth Gibbs, and 15 and 16 to William Kinton Gibbs (subject as aforesaid), as and for their shares in the said trust sum of 1230*l.*; they, the parties of the first part, declared their approbation of the said application of the fund, and released John Pring, his heirs, executors, and administrators from the trusts absolutely.

On this point the defendants further alleged that they believed there was no such understanding as that in the bill alleged, and that Miss Gibbs obtained the renewal of the lease for herself, subject to the rights of the mortgagees. They denied that, either from conversations or from the title deeds, they were ever aware of the existence of a trust. As to Vassall's mortgage, the abstract was furnished by Mr. William Sweet, solicitor, on behalf of Mary B. Gibbs; and the instructions for the loan were received from T. W. Gibbs.

Some time before the 8th of September, 1853, the defendants were informed by T. W. Gibbs that he (on behalf of his daughter) had entered into a treaty for the purchase of the reversion. The defendant Cox said he believed a valuation by Mr. Horwood was produced to him, but of what amount he could not set forth; such valuation, if the same were produced, not being deemed such as they could rely upon or attend to in any way on behalf of their clients. The defendants declined to act on such valuation, and told the plaintiff T. W. Gibbs that they should require a valuation to be made by Messrs. Pope on behalf of their clients, the mortgagees.

The purchase deed of the reversion was prepared by the defendants acting for Mary B. Gibbs alone, through the instructions of her father. As to the mortgages to William Vassall and Miss Cox, the defendant Alfred Cox alleged that before they were executed, he stated that, judging from the statements of T. W. Gibbs, he believed that the property which was the subject of the present suit would be a sufficient security for the 1400*l.* intended to be secured to William Vassall, and the 1200*l.* intended to be advanced by Miss Cox, but that they (the defendants) should require another valuation. Accordingly, Mr. Pope was instructed at the time when the deed of conveyance was in the hands of the dean and chapter, and the plaintiff Mary B. Gibbs had contracted with Warren and Munn for the grants to them; and he the defendant, therefore instructed Mr. Pope to assume that the grants were actually executed.

1862.
GIBBS
v.
DANIEL.
Statement.

Mr. Pope's valuation was as follows:—"We are of opinion that the value of Mr. Gibbs's freehold ground, Wellington Park, Durdham Down, is 2400*l.* In estimating the sum we took into consideration the present state of the premises and the lettings as represented by him. We are of opinion that the two double cottages and the one inhabited by Mr. Gibbs, the two small cottages and stable, and their site and ground attached, are worth 1100*l.*, making the total present value of the estate 3500*l.*" The defendants said that at the time of the purchase by them no houses had been built on the plot of ground comprised in the grant of the 18th of September, 1854, so that, in fact, the said valuations being based upon the assumption of the ground-rents being adequately secured was too favourable. As to the purchase of the 11th of September, 1854, they alleged as follows:—

"When the purchase by the plaintiff Mary B. Gibbs of the fee simple of the premises was being negotiated,

1862.
 GIBBS
 v.
 DANIEL.
 —
Statement.

it was in the first instance supposed that it might suffice for her to raise by mortgage the sum of 1000*l.*, but before the money had been advanced it became evident that 1200*l.* was required to pay the purchase-money for the fee simple of the premises and the expenses attending the purchase, and for the other purposes to which the sum of 1200*l.*, raised as afterwards mentioned, was applied as afterwards stated, and we accordingly procured a client of ours, Miss M. M. Cox, to advance that sum to the plaintiff Mary B. Gibbs, and she accordingly paid to us for the plaintiff Mary B. Gibbs the sum of 1200*l.* on the 13th of July, 1854, which sum was applied as follows—the sum of 800*l.* in payment of the purchase of the fee simple, together with 48*l.* 13*s.* 6*d.* interest thereon, 57*l.* 9*s.* 6*d.* to the solicitors for the dean and chapter for costs and valuation fees; 152*l.* 10*s.* advanced by us for payment of the renewal fine of said lease, with 6*l.* 3*s.* 5*d.* interest; 69*l.* 10*s.* owing to us on an equitable security, dated the 27th of May, 1853, given to us by the plaintiffs Thomas W. Gibbs, Mary B. Gibbs, and Ann Gibbs, with 3*l.* 16*s.* 2*d.* interest; 6*l.* 1*s.* for premiums paid by us for insurance of lives on which the property was held; and the residue, amounting to 55*l.* 16*s.* 5*d.*, retained by us in part of our costs, it being arranged that the residue of our costs should stand over.”

Further, they said that Wm. Vassall and Miss Cox had continued to be their clients, and that the mortgages were prepared by them acting as solicitors both for Mary B. Gibbs and the mortgagees respectively; but they denied that they acted under instructions from T. W. Gibbs alone. As regards the mortgage for 1200*l.* the defendant Alfred Cox alleged he was positive that the plaintiff Mary B. Gibbs attended him on more than one occasion, and was fully cognisant of and sanctioned the raising of the sum.

The plaintiffs in their amended bill (after the draft

1862.
 GIBBS
 v.
 DANIEL.
 —
Statement.

bills of costs had been produced in the cause) alleged that the law business arising out of the renewed lease, the purchase of the reversion, and the mortgages, was charged against T. W. Gibbs in their original drafts of bills of costs and in their books; but in some of the fair copies and late bills of costs it was charged to Mary B. Gibbs. They also said that no account or memorandum was ever given to the plaintiffs of the said application of the 1200*l.* mortgage money, nor was the consent of the plaintiffs asked to such application, nor were any of the bills of costs alleged by the defendants to have been paid with the 1200*l.* ever taxed.

On the execution of the mortgage the charges for 152*l.* 10*s.* and 69*l.* 10*s.* were not given up. Many of the receipts and payments on account of the property passed through the hands of the defendants, and were entered in one general account against T. W. Gibbs alone.

The charge as to the earlier and draft entries respecting the law business was admitted by the defendants. Edward Daniel said that when he saw by the call-book that T. W. Gibbs had been in the office, not knowing what business he came about, or which of his children to charge, he several times entered "Dr. T. W. Gibbs," and occasionally filled up the charge, and at other times left it blank to be filled up by the defendant Alfred Cox.

As to the facts more immediately prior to the purchase the evidence was conflicting.

The bill alleged that in September, 1855, the plaintiff T. W. Gibbs became embarrassed, and was threatened by his unsecured creditors in respect of debts contracted for building materials and other matters. Among the creditors were Messrs. Grevile, solicitors, of Bristol. The bill alleged that the defendants knew of his embarrassments, having been informed thereof by Messrs. Grevile; and at a meeting of the creditors some bill of

1862.
GIBBS
v.
DANIEL.
—
Statement.

costs was handed in or referred to by them as creditors, and some proposals were made that the daughters' property should be given up, and they should come in as creditors; but no arrangement was come to. T. W. Gibbs also became distressed in mind, and whilst in this state, shortly before December, 1855, he and his daughter, Mary B. Gibbs, at the request of the defendants, had an interview with them, and at this interview the defendants stated that their clients, the mortgagees, had frequently written for their interest. That thereupon Mary B. Gibbs and Ann Gibbs became desirous of raising a sum of money in order to settle with their father's creditors. That the defendants offered to lend them 300*l.*, and to include the same, together with their costs and interest, in a further charge upon Amoury Close, and to wait without interest until such time as the property could bear it; but this proposal was never accepted. On the 13th of September, 1855, T. W. Gibbs was, by the advice of his medical attendant, Mr. Bernard, removed to the country and placed under the charge of a keeper, and he remained of unsound mind till the latter end of January, 1856, and it was not until after April, 1856, that he was able to transact any business. In the latter end of 1855 or beginning of 1856, Miss Gibbs was informed by Mr. Grevile that the defendants had determined on that very day to advertise the mortgaged property for sale by auction, which they said they could do without notice, but that he (Mr. Grevile) had induced them to postpone the sale for a week. That no written notice was given by the mortgagees, or the defendants as their solicitors, that they intended to sell. A further meeting having taken place between the defendants, Mr. Grevile, and Miss Gibbs, the proposition of a purchase by the defendants was started by them, and thereupon the intervention of another solicitor was considered necessary, and that, at the suggestion of the

1862.
 GIBBS
 v.
 DANIEL.
 Statement.

defendants, Mr. Thomas Crosby, a solicitor of Bristol, was called in. That an interview took place between Mr. Crosby and the defendants in a separate room, at which none of the plaintiffs were present, being the first interview in relation to this business, Mr. Crosby not having seen Mary Bryant or Ann Gibbs thereon in reference to any proposal whatever. At this interview the defendants proposed that if Mary B. Gibbs would convey to them the mortgaged premises and other property after mentioned, and Ann Gibbs would convey to them two houses and other property after mentioned, they would give them 150*l.* and a clearance. Mr. Crosby afterwards told the Misses Gibbs that the defendants had intimated to him that unless they immediately accepted the offer they would instantly advertise the property for sale. The defendants themselves also urgently pressed the Misses Gibbs to accept their offer, and from time to time sent messages to the place where they were residing, and in particular about the 10th of December, urging them to give a final answer. That at length the Misses Gibbs, being distressed and perplexed, and not appearing to have any other alternative, consented to accept the offer.

That the defendants thereupon prepared the two draft agreements, which were sent to the office of Mr. Crosby, who called on the Misses Gibbs and stated they must call and sign them immediately, or the defendants would put the property up for sale by auction. That Mary Bryant Gibbs and Ann Gibbs accordingly signed the papers, both of which were dated the 8th of January, 1856. By one a memorandum of agreement which appeared to have been prepared in December, 1855, and to have been intended to be executed by Ann Gibbs also, and made between Mary Bryant Gibbs of the one part, and the defendants of the other part, after reciting the title of Mary Bryant Gibbs to Amoury Close, the grants of the 16th, 17th, and 18th of September, and the mortgages of

1862.
 GIBBS
 v.
 DANIEL.
 —
Statement.

the 19th of September, 1854, and that Mary B. Gibbs had conveyed to other parties the remaining small portion, of the value of 60*l.*, of Amoury Close; also that she was entitled to three policies for 400*l.*, 200*l.*, and 700*l.*, on the life of Miss Hounsell, for further securing the said sum of 1400*l.* and interest, and that she was also seised of a messuage called No. 2, Anglesea Place, Durdham Down, subject to a fee-farm rent of 3*l.* a year, and to a mortgage debt of 280*l.* and interest due to one George Alvis, it was thereby agreed that on or before the 22nd of January then next the defendants should pay 75*l.* to the said Mary B. Gibbs, and should take upon themselves the payment of the said mortgage debts and interest, and covenant to indemnify her from the said debts, interest, ground-rents, and all covenants, &c.; and that she, Mary B. Gibbs, should, on or before the said 22nd of January, and on the due exercise of such covenant of indemnification, execute to the defendants, their heirs, executors, administrators, and assigns, proper conveyances of all her estate and interest in Amoury Close, except all the remaining portion aforesaid, and of all her estate and interests in the messuage, No. 2, Anglesea Place, and in the policies of assurance.

The three policies were in fact never assigned, having been surrendered, and the surrender moneys, amounting to 40*l.* 10*s.* 8*d.*, received by the defendants on the 26th of May, 1856.

By the other memorandum of agreement, dated the 8th of January, 1856 (the draft of which appeared to have been prepared in December, 1855), and made between Ann Gibbs of the one part, and the defendants of the other part, reciting that Ann Gibbs was seised of the two said dwelling-houses, 7 and 8, Wellington Park Villas, subject to a fee-farm rent of 5*l.* each, and to the mortgage debt of 500*l.*, secured by the mortgage of the 26th of January, and an arrear of interest; and reciting

the grant of the 18th of September, 1854; it was agreed that the defendants should, on or before the 22nd of January then instant, pay to the said Ann Gibbs the sum of 75*l.*, and take upon themselves the payment of the mortgage debt of 500*l.* and interest, and should execute a covenant to indemnify the plaintiff Ann Gibbs from the said debt and interest and ground-rents, and that the said Ann Gibbs should, on or before the said 22nd of January and the due execution of the said covenant of indemnification, execute to the defendants proper conveyances of the messuages, 7 and 8, Wellington Park Villas, and also of the plots of ground contained in the grant of the 18th of September, 1854.

The defendants, in answer to this part of the case, alleged that they made repeated applications to Mary B. Gibbs, through her father T. W. Gibbs, from February to November, 1855, for payment of interest on the mortgages, and that Mr. T. W. Gibbs requested them to procure 200*l.* for a short period on the security of houses in Wellington Park.

That on the 22nd of November T. W. Gibbs expressed to them the defendants his fear of being arrested by his creditors, and said he must retire out of their reach. That it was not until the 22nd of November, 1855, that they had any knowledge of T. W. Gibbs's embarrassments. That meetings took place between Mr. Giles Grevile and defendants after this date, but not, to the best of their belief, in the presence of Mary B. Gibbs. That her father was then in Bristol, having hidden himself from his creditors. That the defendants believed that T. W. Gibbs shortly after became unable to transact business, owing to distress in consequence of his debts; but they said he continued in such state for a short period only, and that he had recovered before the 29th of January, 1856, after which date he was in a fit state to transact business; and that he removed from place to

1862.
GIBBS
v.
DANIEL.
—
Statement.

1862.
GIBBS
v.
DANIEL.
Statement.

place, not in consequence of the state of his mind, but to avoid his creditors.

That the defendants did not offer to lend plaintiffs 300*l.*, and include the same in a further charge on Amoury Close, and to wait for the interest; but they did proceed to raise a sum upon the security of the premises in Wellington Park in manner aforesaid. They said that, their clients' interest remaining unpaid and unsecured, they were not willing to wait any longer; and, after several interviews with Mr. Crosby relative to the payment of the interest due to their clients, the proposition for a purchase was started, but not by them.

The defendants alleged that the intervention of another solicitor was not necessary, as Mr. Crosby was in fact acting as solicitor for Mary Bryant Gibbs and Ann Gibbs. That on the 23rd of November Mr. Crosby called on defendants, and on that and on the following day had an interview with him, stating that he had been concerned for T. W. Gibbs and his family for many years, and requested to be informed of the position of mortgages and other transactions between the defendants and his clients. That the defendants told him of the amounts due and the repeated applications for interest, and requested him to see if any means could be found to prevent the necessity of a sale, which was inevitable unless this could be done. After some discussion Mr. Crosby gave it as his opinion that if 200*l.* could be found by sale of the equity of redemption of the mortgaged premises, in order that a composition might be offered to the creditors, who had declared their intention of holding the Misses Gibbs liable for their father's debts, the former might be released from their difficulties. That Messrs. Grevile were at one time disposed to accept this offer, but afterwards declined to purchase. That on the 7th of December Mr. Crosby proposed to defendants that they should give 150*l.* for the equity of redemption, and discharge Mary

B. Gibbs and Ann Gibbs from payment of costs, and also exonerate T. W. Gibbs from liability in respect of a joint note due from him and Messrs. Pring & Son to Mr. John Arnold, a client of defendants, for 100*l*. That defendants agreed to this proposal, and volunteered to abandon their contract in favour of the creditors, provided payment was made of the interest and other moneys (exclusive of principal) to defendants' clients, and also their costs. It was arranged that a decisive answer should be given on the 11th of December.

That on the 8th of December Miss Gibbs called on defendants, and told them that she was consulting with her friends, and she particularly mentioned her uncle, Mr. James Gibbs, an auctioneer and appraiser, and promised that defendants should have a decisive answer on the 11th of December, at twelve o'clock. That on the 11th she called and said that a final answer would be given at two o'clock, but, not having heard from her, defendants sent to her at the house of her aunt, and were told they might learn from Mr. Grevile what the answer was. They therefore sent to Mr. Grevile's office, and not finding him they sent the following letter:—

1862.
GIBBS
v.
DANIEL.
—
Statement.

“ Thomas Crosby, Esq., Solicitor, Bristol.

“ Dear Sir,—You will doubtless remember that Miss Mary Bryant Gibbs undertook positively to give us a final answer on the propositions submitted to her and her friends at twelve o'clock this day, and we consented to a further postponement of proceedings, on the part of our clients, on the faith of his promise. Miss Gibbs has been to us for information once or twice since, and at twelve o'clock to-day promised us a final answer at two o'clock. We have not seen or heard of her, and on sending a messenger to her aunt's were informed that she was gone away, and that we might learn from Mr. Grevile what the answer was. We have sent to Mr. Grevile's office,

1862.
 GIBBS
 v.
 DANIEL.
 Statement.

and find him gone away. Under these circumstances we feel that our consideration for the Misses Gibbs is ill bestowed, and that we must now simply look to our clients and ourselves. We remain, dear sir, yours truly,
 "DANIEL AND COX."

That a few days afterwards Mr. Crosby told defendants their offer was accepted, and the drafts of the contracts were prepared. They were perused and approved by Mr. Crosby, and afterwards executed on the 8th of January.

The bill alleged that when the deeds of purchase were engrossed ready for execution, the plaintiffs Mary Bryant and Ann Gibbs, on the 12th of April, 1856, went with their father, who had not then recovered his health, and executed the deeds and received 150*l.*, which was appropriated to the payment of some of the plaintiff T. W. Gibbs's creditors.

That by the first of these deeds, dated the 12th of April, 1856, and made between Mary B. Gibbs of the one part and the defendants of the other part, after reciting that there was owing to Miss Cox, under the mortgage, 1200*l.* and 50*l.* for interest, and owing to William Vassall on the mortgage 1400*l.* and 168*l.* for interest, and that the defendants, as copartners, had contracted with Mary B. Gibbs for the absolute purchase of the premises for 100*l.*; in consideration of 100*l.* to Mary B. Gibbs paid by the defendants, the property called Amoury Close, and all the hereditaments comprised in the indenture of the 11th of September, 1854 (except the sixteen plots granted by the deeds of the 16th, 17th, and 18th of September, and a small portion), were conveyed to and to the use of the defendants and their heirs, subject to the two indentures of mortgage.

By a bond of even date the defendants covenanted to indemnify Mary B. Gibbs against the mortgages of the 19th September, 1854.

By another indenture of the same date, and made between Ann Gibbs of the one part and the defendants of the other part, in consideration of 50*l.* to Ann Gibbs paid by the defendants, the two plots of ground called 7 and 8 Wellington Park were conveyed to the defendants, their heirs and assigns, the mortgagee, Ann Vassall, having been previously paid off by the defendants on the 26th of March, 1856.

1862.
GIBBS
v.
DANIEL.
—
Statement.

By a third indenture of the same date, between the same parties, for a nominal consideration, the four plots of ground, known as 2, 3, and 4, Wellesley Place, and No. 3, Douro Place, were conveyed to the defendants, their heirs and assigns; and by a bond of even date the plaintiff Ann Gibbs was indemnified against Mrs. Vassall's mortgage of 500*l.*, but not against the ground-rents, as required by the memorandum of the 8th of January, 1856.

A letter of even date was handed by Messrs. Daniel & Cox to Mary Bryant and Ann Gibbs, stating that they the defendants had no claims on them for costs or otherwise.

The plaintiffs alleged that, until T. W. Gibbs's illness Mr. Crosby had not acted for them in any matters relating to the mortgaged premises, and that at the time of the purchase he was ignorant of the true value of the property. No calculation was entered into or reason given why the sums of 100*l.* and 50*l.* were fixed upon, nor were the valuations either of Mr. Horwood or of Mr. Pope alluded to. No bills of costs were delivered at any time, and if any bill of costs was handed in by Mr. Crosby at the meeting of the creditors, it had not been delivered to the plaintiffs or any of them. Notwithstanding the statements about the importunity of the mortgagees they were still unpaid, and the alleged importunity was a fiction. The purchase-money of 100*l.*, even with the alleged further consideration, was very far below the real

1862.
 GIBBS
 v.
 DANIEL.
 —
Statement.

value, the actual outlay, including the cost of the original leasehold, 495*l.*; the renewal, 152*l.* 10*s.*; the reversion, 800*l.* less 60*l.*, leaving 740*l.*; making roads and fences, 200*l.*; boundary walls, 90*l.*; new road with footpaths and curbs, 190*l.*; erecting eight houses, 1030*l.*: total, 2897*l.* 10*s.* On the 8th of January and the 12th of April the premises comprised in the indenture of the latter date were of much greater value than the mortgage-money and consideration-money put together (2918*l.*), inasmuch as they were of the value of 6000*l.* or thereabouts. The value of the premises comprised in the indenture of the 12th of April were of far greater value than 575*l.*, being of the present value of 800*l.* or thereabouts. That the defendants were well aware of the true value, and had acquired the premises at a great undervalue; that they had sold parts and received the purchase-money to the amount of 2160*l.*, and ground-rents to the amount of 1020*l.*, and that the unsold portion was worth about 3000*l.*

The bill prayed that the three indentures of the 12th of April, 1856, might be declared invalid, and that reconveyances might be executed, and asked for an account.

The defendants' statements as to the proceedings subsequent to the 8th of January, 1856, were as follows:—

That on the 6th of February, 1856, Mr. Charles Harris, solicitor of Bristol, called upon them on the part of the creditors, and stated that he had understood from Mr. Thomas Crosby that defendants had contracted for the purchase of the property, and that 150*l.* would be divided amongst Mr. Gibbs's creditors if they would accept that sum by way of composition in full of their demands, and that the defendants were willing to abandon such contracts in favour of the creditors if they wished, on payment by them of the amount of defendants' claims, and he requested to know what those terms were, that he might inform the creditors at an adjourned meeting to be held next day. At such interview Mr. Crosby in-

formed Mr. Harris verbally of defendants' claims, and those of their clients, and stated that defendants were about to write a letter, which they accordingly wrote, and sent in the words following :—

1862.
 GIBBS
 v.
 DANIEL.
 —
Statement.

“ Bristol, 6th February, 1856.

“ Thomas Crosby, Esq., solicitor, Bristol.

“ Dear Sir,—As the solicitor acting on the part of the Misses Gibbs, we beg to address you on the subject of our position with your clients. As they express a desire, in case their father's creditors should deem it desirable, to take the property on mortgage to our clients (and lately contracted to be sold by the Misses Gibbs to us for 150*l.* over and above all charges and claims by ourselves and our clients), we beg to state that in case the creditors are prepared within fourteen days after the meeting which takes place to-morrow to pay the sum of 707*l.* 4*s.* 6*d.*, being the interest, &c., now due, and our costs attendant on the late negotiation, &c., and will make arrangements satisfactory to our clients for the payment of the principal money, that we shall be willing to abandon our contracts with the Misses Gibbs. As the result of this matter, there will be due to our clients as mortgagees of the Misses Gibbs, after payment of the said sum of 707*l.* 4*s.* 6*d.*, the following sums on these securities:—The Rev. W. Vassall, on Amoury Close, 1400*l.*, interest paid to 6th of February, 1856; Miss M. M. Cox, on Amoury Close, 1200*l.*, interest paid to 15th of January, 1856; Mrs. Vassall, on 7 and 8, Wellington Park Road, 500*l.*, interest paid to 26th of January, 1856; Mr. George Alvis, 2, Anglesea Place, 280*l.*, interest paid to February, 1856. We also mention, that the creditors may perfectly understand our position, that 900*l.* is due to our client Mr. Stiffe, as mortgagee of Mr. T. W. Gibbs, on 1 and 2, Wellington Villas; and also that if the above money is paid, the creditors will be

1862.
GIBBS
v.
DANIEL.
—
Statement.

entitled to receive the dividend on the debt due to our client from Mr. Pring, which debt and interest amount to about 126*l*. We shall be glad to hear from you what the creditors determine as soon as possible, and remain,

Dear Sir,

Your truly,

DANIEL & COX."

The defendants said that the contracts with the Misses Gibbs included the equity of redemption of the premises described as "2, Anglesea Place," but defendants gave up the same at the request of Mary B. Gibbs, through her father, and after some discussion with Mr. Crosby, such premises not being of any value over the mortgage-money and interest. Defendants were afterwards informed that the creditors declined to accept their offer and take the property, and that they had consented to accept a composition.

They denied the charges in the bill, and alleged that Mr. Crosby had acted in a great many matters for the plaintiffs and their family, and that after several conferences between the Misses Gibbs and their relatives 150*l*. was fixed upon as a fair price for the premises. They denied having represented the mortgagees as importunate, and said they only stated that the interest must be paid. A great part of Miss Cox's mortgage debt was still due, and Wm. Vassall's debt had been transferred. They denied that 150*l*. was at all below the value of the premises at the time of the purchase. They further said that the property had decreased in value since Messrs. Pope's valuation in consequence of the Russian war.

The plaintiffs by their amended bill further alleged that the offer contained in the letter of the 6th of February, 1856, was so clogged with conditions that it was

impossible for it to be accepted in such terms. The approval of Mr. Crosby to the deeds of contract and conveyances, if given, was merely to see to their being regular in form. If any bills of costs were handed in by Mr. Crosby at the meeting of creditors, he had no authority to examine and no means of examining the accounts.

On the 26th of March, 1856, the defendants issued circulars stating that they were in a situation to give the price of the garden part of Amoury Close, which would be sold under restrictions, &c.

Miss Cox, on the 29th of April, 1856, by a deed of conveyance of that date, for the nominal consideration of 10s., released to the defendants a small plot of the mortgaged premises called Amoury Close. The plaintiffs alleged that the value of this plot was 1000*l.*, and that the conveyance expressed that Miss Cox was satisfied with the residue of the hereditaments comprised in her mortgage as a security for 1200*l.* and interest.

By ten indentures of purchase dated on various days, from the 27th of May to the 18th of December, 1856, the defendants sold as many portions of the small plot comprised in the indenture dated the 29th of April, 1856, to the purchasers therein named for several sums amounting in the whole to 771*l.*

In the course of the same year other portions of the property comprised in Miss Cox's and in William Vassall's mortgage were sold. On the 30th of November part of the property comprised in Vassall's mortgage was agreed to be sold to one Stroud for the sum of 600*l.*; and on the 21st of December, 1858, Vassall's mortgage was transferred.

In their voluntary answer to the amended bill the defendants set forth a letter, addressed by them to T. W. Gibbs, on the 19th of November, 1855, in which they wrote as follows:—"The business cannot so remain, and,

1862.
GIBBS
v.
DANIEL.
Statement.

1802.
 ———
 GIBBS
 v.
 DANIEL.
 ———
Statement.

unless we see you to-morrow we must send to your daughters to come to us." They contended that this letter showed that at that time they treated T. W. Gibbs as agent for his daughters. They also set forth a letter, written by T. W. Gibbs to a Mr. Pitt shortly before the 31st of January, 1856, in the postscript to which were these expressions:—"I think it would have a very good effect if you were to state in bottom of your circular calling the meeting that Mr. Gibbs had been insane since November, but was now getting better." They also said that since their former answer they had ascertained that they had prepared and engrossed a further charge, in favour of Mr. John Alvis, for 200*l.*, and they alleged, if the said Thomas Washer Gibbs had gone on, this matter would have been concluded. As it was, they alleged that they paid Mr. John Alvis 5*l.* on the 26th of April, 1856, as a compensation for keeping his money unemployed. They denied that they had put any pressure on the Misses Gibbs, and said that the latter had the benefit of the advice of their father, Mrs. Chappell, Mr. Salter another uncle, and the advice and assistance of Mr. Crosby and Mr. Pitt. The creditors, after inquiry, thought it unadvisable to disturb defendants' contract, and resolved to accept T. W. Gibbs's offer of 4*s.* 6*d.* in the pound.

Nothing was done by the defendants to realise the property till after the decision of the creditors, soon after the 6th of February, 1856.

In a joint affidavit by the plaintiffs, Miss Gibbs verified the statement as to the meeting between the defendants, one of the Messrs. Grevile, and herself, and that Mr. Crosby was sent for by the defendants. She deposed also that when the defendants' offer was communicated to her by Mr. Crosby she was startled at the proposal, being quite unprepared for it, and considering that it was previously settled as to the 300*l.* She gave Mr. Crosby no authority to entertain such proposal, and she thought

it premature. She and her sister believed that, from their father's strange manner, Mr. Crosby was misled as to the value of the property. The deponents remembered that Mr. Crosby advised them to go through the Insolvent Court, and that the defendant Alfred Cox stated that, in case the property should not realise enough by sale to pay the mortgages, costs, and incumbrances, they would be personally liable. This frightened them very much. The plaintiff T. W. Gibbs said, that in 1852 Mr. Crosby borrowed money of him, and had verbally offered to work it out in law business, or to that effect; and it was admitted he had assisted the plaintiff in his affairs on several subsequent occasions. The Misses Gibbs said that their reason for going to Mr. Crosby, as suggested, was because they knew him to be acting in the matter of their father's creditors, and they knew of no other course to adopt. Mr. Crosby had never sent them in any bill of costs in relation to Amoury Close or Harding's Paddock. They further said they remembered, in the month of December, 1855, whilst their father was away and incapacitated, that at an interview with the defendants, in company with Mr. Grevile, the solicitor for the English Provident Building Society, Mr. Grevile told the defendants in their presence that the society would give 1000*l.* for the garden plot, *i.e.*, the portion of Amoury Close released from Miss Cox's mortgage. The defendant Alfred Cox told them that, even if this were done, it was not enough to pay them off. As to the release, T. W. Gibbs said that in 1854 his son, having had certain moneys advanced to him, and Pring having lent him, the said T. W. Gibbs, the trust fund, it was thought prudent to release Pring so far as his own and his children's personal claim against him was concerned, the understanding being that the trust in Amoury Close still subsisted. Neither of the Misses Gibbs signed at the time, plaintiffs' object being to delay any final arrangement until matters

1862.
 GIBBS
 v.
 DANIEL.
 —
Statement.

1862.
 GIBBS
 v.
 DANIEL.
 Statement.

could be placed on a satisfactory footing. No mention was made in the release of Amoury Close, neither was it intended that that property should be in any way affected thereby. The daughters deposed that afterwards, at the end of 1855 or beginning of 1856, their father being in an embarrassed and incapacitated state, Mr. Pring became uneasy as to his position, and they signed the release for his satisfaction, and without the least intention of compromising their rights as to the trust fund.

Mr. Grevile deposed that he was asked by one of the defendants to peruse a draft which he understood to be a draft conveyance of the equity of redemption to the defendants, and which he refused to do, for in the first place he did not consider himself professionally concerned, and in the next place he did not like the transaction.

Messrs. Horwood and Wainwright deposed to having valued the fee simple of Amoury Close in March, 1852, as building land, at 6000*l.*; as it stood in April, 1856, at 6358*l.*; and as it stood on the 20th March, 1860, at 6128*l.* 6*s.* 8*d.*

Messrs. Daniel and Cox, by their affidavit, denied any knowledge of any trust whatever; they denied that when Miss Gibbs was informed that if the mortgages should be deficient she would be personally liable she appeared frightened or surprised, or that at any interview as alleged Mr. E. Grevile said that any building society would give 1000*l.* for the garden plot; they deposed that Mr. Grevile's refusal to peruse the draft related to another matter.

Mr. Crosby, in an affidavit, said he had been solicitor for T. W. Gibbs for seventeen years and upwards, and for a number of years for others of the plaintiffs and their friends. In August, 1852, he made out a bill of costs against T. W. Gibbs, showing a balance which had never been paid. T. W. Gibbs was always in his debt. During Gibbs's difficulties in 1855 he felt willing to act for the

1862.
 GIBBS
 v.
 DANIEL.
 Statement.

plaintiffs, though he did not expect to be properly paid for his services. In November, 1855, he was consulted by Mary B. Gibbs and Ann Gibbs, and he found from his call-book that Miss Gibbs called at his office on the 7th, 9th, 13th, and ten other days in November, sixteen days in December, and seventeen days in January, 1856. He had interviews with others of Miss Gibbs's relatives and friends. They all said that the property, if sold, would not produce the amount due upon it, whereupon he proposed to plaintiffs to sell the equity of redemption. Mr. Grevile at once proposed to give 100*l*. Ultimately the deponent was unable to prevail on any of the solicitors of the mortgagees except the defendants to purchase. The defendants agreed to give 150*l*. for the equities of redemption, and to give a full discharge of all their claims for costs on the plaintiffs. The sum of 150*l*. was accepted by the deponent as the lowest sum which he could offer to the creditors with any prospect of their accepting it. On the 31st of January, previously to a meeting of the creditors, deponent received the following letter from the plaintiff T. W. Gibbs:—

“Mr. Crosby.

“Dear Sir,—Should Mr. Harris, or any one, call on you about my matters and the property on Down, please to give no answers at all; say, Let it be brought on at the meeting, Thursday, and then you will consult Misses Gibbs, your clients; but do not tell them, as things are strangely altered since I saw you.”

That he, Crosby, perused the drafts on behalf of the plaintiffs, but did not carefully peruse the bill of costs, as the plaintiffs were quite satisfied that the property, if sold, would not have realised the mortgage monies and interest. Deponent therefore thought any scrutiny of the costs quite useless. In the year 1853 he was re-

1862.
 GIBBS
 v.
 DANIEL.
 —
Statement.

requested by T. W. Gibbs to propose the release to Pring; no mention was made by T. W. Gibbs that the property had been transferred to his children; but he (Crosby) understood the trust was fully at an end. It was executed by T. W. Gibbs and his son on the day of the date, by Mary B. and Ann, Gibbs (deponent believed) a few days afterwards, and by Florence E. Gibbs on her coming of age.

Mr. Pitt deposed that in 1859 T. W. Gibbs told him he was about to institute this suit. Deponent said he thought it was most ungracious to attempt it, when he and his daughters had been so anxious that the property should be sold at the time. T. W. Gibbs said he did not mind that, and that he could set the sale aside, for no lawyers could buy of their clients, and quoted a law case to that effect, which he said he had read. Deponent said, "Suppose Daniel and Cox had lost 3000*l.* by the speculation, would you have lost anything then?" He shrugged his shoulders and laughed, intimating his dissent.

Mr. Pope, surveyor, deposed that in July, 1854, he was instructed by defendants to value the property, on the assumption that sixteen of the plots had ground-rents of 4*l.* 10*s.* each secured on them, and the others 3*l.* each. In his valuation he included two cottages which ought to have been pulled down in order properly to complete the plan for building purposes; therefore his valuation was too high. He valued the land as building land, at the rate of between 700*l.* and 800*l.* an acre. In the year 1852 ninety-six new houses were commenced in the parish of Clifton, in 1855 only nineteen, and in 1856 only nineteen. He attributed the depreciation to the great number of failures by builders, the fear of a long war with Russia, and the increase in the price of all materials. At Christmas, 1855, he should not have valued the property at above 2600*l.* He could account for Mr. Horwood's valuation only on the presumption

that the whole of the land was at the time sold in parcels, or set out in fee simple, or for ground-rents in perpetuity.

Four other surveyors, Messrs. Gabriel, Sturge, Mar-
mont, and Bessell, valued the property in 1855 at 2400*l.*,
2678*l.*, 2424*l.*, and 2400*l.* respectively.

An immense mass of evidence was put in, the reading
of which occupied the Court several days.

1862.
GIBBS
v.
DANIEL.
Statement.

Mr. *Malins* and Mr. *Wyllys Mackeson* for the plaintiffs.
—The case made by the bill and established by the evi-
dence was that the defendants, being and having been for
some time the solicitors and confidential advisers of the
plaintiffs, purchased from them their property while under
pressure, and while the professional relation was in full
force. This was of itself enough to vitiate the purchase,
but there were in this case circumstances which placed it
far beyond the ordinary case of a purchase by a solicitor
from his client. It was not necessary that the purchase
should be for an under-value, but here the price given
was not a fifth part of the proved value.

Argument.

By the terms of the agreement for the sale of the
equity of redemption, the defendants gave the plaintiffs
what they called a clearance for the bill of costs, which
they admitted had never been presented either to the father
or to the daughters. Then, although the original drafts
of bills of costs showed that the costs were owing from the
father, these defendants charged the daughters with them.
[The VICE-CHANCELLOR.—Is there anything about a
clearance in the recitals of the deeds of the contract for
purchase?] There is no mention of a clearance in the deeds
of contract, and no indemnity was given to the defendants
as to the father's debts. Previously to the purchase, the
defendants called a meeting of creditors, with debts
to the amount of 1200*l.*, and offered them the property
at the price at which they were buying it, but so clogged
with conditions that it was obvious they would not accept

1862.
 GIBBS
 v.
 DANIEL.
 —
Argument.

the offer. Moreover, it was proved that the defendants had knowledge of Mr. Horwood's valuation at 6000*l.*; they did not deny that 1000*l.* had been offered by the building society for the small plot above mentioned. They admitted further that they had sold parts of the property for 2160*l.*, and ground-rents to the amount of 1020*l.*, making together 3180*l.*; and they valued the unsold property at 3000*l.* This was almost Mr. Horwood's valuation. But, even taking Mr. Pope's valuation of 2400*l.*, the defendants had made a large profit. It was clear, therefore, that the sale was at a grossly unequal price.

Again, it was clear that this property was impressed with a trust within the knowledge of the defendants, who, in law, must be taken to know what these trusts were.

Again, it was proved by the evidence that the defendants had alarmed the minds of the Misses Gibbs by representations that, as owners in fee of the property, they were liable for their father's debts, and that the mortgagees were pressing for their money. These statements were both untrue, and it was submitted that this misrepresentation was enough to annul the contract. But further, the defendant forced the sale on the daughters in the absence of their natural protector; while at the very time when they put this pressure on their former clients they had in their hands monies available for payment of the most pressing claim. Again, though they provided that Mr. Crosby should be called in for the protection of their former clients, they the defendants took care to withhold from him all the material facts relative to their clients' position, which would have enabled him to render any assistance to the plaintiffs.

On the principle laid down in all the authorities, this purchase must be set aside.

In *Holman v. Loynes*(a) a purchase by a solicitor was

(a) 4 De G. M. & G. 270.

set aside at the instance of the heir-at-law, the defendant being unable to show a better price could not be obtained. In *Gresley v. Mousley* (a) a purchase by a solicitor was set aside after the lapse of nearly eighteen years. In *Lawless v. Mansfield* (b) a purchase of an annuity by a solicitor from his client was set aside. *Gibson v. Jeyes* (c) was also cited.

1862.
GIBBS
v.
DANIEL.
—
Argument.

Sir *H. Cairns*, Mr. *C. Hall*, and Mr. *Everitt*, for the defendants.

It had been argued on behalf of the plaintiffs that the property purchased by the defendants was subject to a trust, and that there had been no actual conveyance from the real owners. But the alleged transaction by which *Harding's Paddock* was bought for 500*l.* (part of the 1200*l.* trust-money) conveyed to John Pring (and without consideration, though one was stated in the assignment) and let to J. K. Gibbs, the son, was incredible. It was no less incredible that Pring, having received the ground-rents, should have handed them back to Gibbs. This arrangement was far more consistent with the intention of securing the property from Gibbs's creditors than of securing any trust-money to Mr. Pring. Moreover, Mr. Pring did not venture to swear that the 500*l.* was part of the trust-fund. *Amoury Close* was conveyed to Mr. Pring because Mr. Gibbs had been a bankrupt; there was a risk that the creditors would interfere with the property, and Mr. Pring was made a mortgagee merely for the purpose of raising the money. It was a mere device to secure the property against Gibbs's creditors. Mr. Pring next assigned *Amoury Close* to Mary B. Gibbs for a nominal consideration, obviously in order to substitute her for her father. If Mr. Pring had held the property as trustee, why assign it to Mary B. Gibbs

(a) *Anté*, vol. I. 450; s.c. 4 De G. & J. 78.

(b) 1 Dr. & W. 557.

(c) 6 Ves. 266.

1862.
GIBBS
v.
DANIEL.

Argument.

merely to hold as trustee? This would have been to incur the expense of the stamp and preparation of the deed for nothing. It was impossible to reconcile any part of the transaction with the idea of any trust. If it was trust-property T. W. Gibbs had a life interest in it, to which the creditors were entitled. It was alleged to be worth 6000*l*. Was a life interest in an estate of 6000*l*. of no object to the creditors? Mr. Pitt, in his affidavit, said Mr. Gibbs told him he wished his daughters to be treated as creditors, but that he never stated the property was held in trust in any way. Mr. Gibbs made a statement of his own and his daughters' property to his accountant, for the purpose of inducing the creditors to accept a composition. Either the property was not his daughters', as then represented, and Mr. Gibbs stood self-convicted of having concealed the real ownership for the purpose of defrauding his creditors, or if in truth the property was his daughters' he must submit to have the stigma of untruth cast upon all his evidence in the suit. Mr. Crosby said the execution of the release was delayed, as he believed, in consequence of Florence Gibbs being under age. Mr. Gibbs said that she was at that time twenty-two years of age; but Mr. Gibbs did not deny the important statement made by Mr. Crosby, that the release to Pring had been prepared on the statement that all trust was at an end. Then, as to the allegation that the defendants knew very well that Mary B. Gibbs was not the beneficial owner—was it consistent with reason to suppose that they would advance money on what they knew to be a bad title, and render themselves liable to an action for doing so? Upon the title-deeds there was not a single sentence which would convey notice of the trust. As to the bills of costs being charged to the father, even if the allegation were true, the defendants knew that T. W. Gibbs at least had a life interest, and was therefore in any case partly liable for the costs. But the

evidence showed that one partner, Mr. Cox, was in the habit of attending to the rough day-book, and the other, Mr. Daniel, used to post it up in the evening. Thus the mistake, if any, arose. It was alleged that the defendants changed their line of defence on the 11th of November; but they uniformly swore that they had no knowledge of Mr. Gibbs's difficulties till the 22nd of that month. On the 19th, a few days before this date, they wrote to Mr. Gibbs, applying for payment of the interest, and treating him as an agent. William Kinton Gibbs also ought to have been a party, inasmuch as after his father's death he might claim as a party to the trust and re-open the litigation.

1802.
GIBBS
v.
DANIEL.
Argument.

At the time of the contract the defendants were not the solicitors of the plaintiffs, or of any of them. As soon as the plaintiffs saw that their solicitors Daniel & Cox were in the position of solicitors to the mortgagees, they called in their own solicitor Mr. Crosby. [The VICE-CHANCELLOR.—Is there any evidence that Messrs. Daniel & Cox gave notice to the plaintiffs that they were no longer their solicitors?] Such a step was not necessary. Miss Gibbs's statement that she was startled at the proposal for a sale was wholly inconsistent with other parts of her evidence. There was evidence to show that the daughters had ample time to consult with their friends. Even after the defendants' notice had expired no step was taken for three or four months. Mr. Crosby himself said he was sent for by the plaintiffs and not by the defendants. From the 7th of November the Misses Gibbs were in almost daily communication with him. [The VICE-CHANCELLOR.—Does Mr. Crosby mean he took any steps to ascertain the value of the property?] No, but the defendants could not be held liable for what Mr. Crosby failed to do. [The VICE-CHANCELLOR.—The law of the Court is, that it is the duty of the old solicitors to see that the new solicitor does his duty: at least they

1862.
 GIBBS
 v.
 DANIEL.
 —
Argument.

· must take the consequences of his neglect.] Mr. Crosby showed that it was not till after efforts had been made to induce Mrs. Chappell and others to buy the property that he, at the suggestion of Miss Gibbs, applied to the defendants to have the contracts drawn up.

The fact that the creditors refused to purchase ought to have relieved the defendants from all unjust suspicion. What was the case of the plaintiffs? That they told the creditors that the property would not produce more than 4*s.* 6*d.* in the £. They now said that what they ought to have given was 15*s.* in the £. Having got rid of the creditors, they now turned round to the purchasers, and complained of the property having been sold at an under-value; and came to a court of equity to assist them to recover it. The evidence showed that Mr. Gibbs's competency to manage his affairs was fully restored in January, 1856. The only foundation for the charge that the defendants' statement respecting their clients' pressure was false, was the defendants' own statement in their answer that their clients had left the conduct of the mortgages wholly in their hands. As to 1000*l.* having been offered for the garden plot, the evidence did not go beyond this, that the owners asked that sum, and there-upon the affair was broken off. As to Miss Cox's release, the fact was—that she received 500*l.* in consideration for that release. As to Alvis's mortgage, the plaintiffs themselves alleged that the proposal fell to the ground, for a reason they assigned. As to the question of value, it was contended that information on this point could not be said to have been withheld, inasmuch as the defendants were no longer in the relation of solicitors. Messrs. Horwood distinctly stated their reason for valuing the property at the sum of 6000*l.*, viz., because they considered it good for building purposes. It was not till after the proclamation of peace with Russia that such property began to improve. The second valuation was

made upon representations only; the third for the purposes of this suit. On the other hand, there was the valuation of Messrs. Pope, the district surveyors of Bristol, gentlemen perfectly qualified to give a good and impartial estimate. It was, moreover, supported by other independent estimates. Again, the defendants undertook to give a complete clearance in respect of costs. The transaction was perfectly fair and honest, and such as this Court would support.

It was quite true that the defendants had been the plaintiffs' solicitors, but they had ceased to be so at the time of these transactions. If an attorney is not acting for a client in a particular matter, he may throw off that character and exercise his independent rights: *Austin v. Chambers* (a). To vitiate the transaction the relation must be *in hac re*: *Edwards v. Meyrick* (b). Again, the mere fact of an increase in the value of the property from adventitious circumstances, which the client has the same means of knowing as the solicitor, cannot be taken into account on a question as to the validity of the sale. It was submitted, therefore, that the bill ought to be dismissed with costs.

1862.
GIBBS
v.
DANIEL.
—
Argument.

Mr. Cox, one of the defendants, was tendered by the defendants as a witness, and, on cross-examination by Mr. Malins, he produced his books, and admitted that there were two entries dated respectively July and November, 1855. The former of these was an entry in the credit account of a gentleman named Alvis, in the following terms:—"Advanced for Gibbs 150*l*." The second was as follows:—"Advanced for Gibbs 50*l*."

Mr. Malins was heard in reply, when his Honour reserved judgment.

(a) 6 Cl. & Fin. 1.

(b) 2 Hare, 60.

1802.
GIBBS
v.
DANIEL.
—
Judgment.

The VICE-CHANCELLOR:—

The object of this suit is to set aside a purchase by the defendants of the equity of redemption of certain property of the plaintiffs. It appears that the defendants had acted as the solicitors of the plaintiffs and also of the mortgagees. It is a material part of the defendants' case that about twenty-one days before the agreement for the purchase they had ceased to act as solicitors for the plaintiffs, and that another solicitor was called in, who acted in their behalf and sanctioned the purchase.

There is no doubt that the intervention of other adequate assistance and advice, so as to remove all that presumption of pressure and influence which arises from the relation of solicitor and client, may give validity to the transaction of a purchase by a solicitor from his client. In the present case there is this peculiarity, that there is the clearest evidence of *actual* pressure by the defendants themselves, and the question is not to be dealt with on the mere *presumption* of influence or pressure. What the defendants have laboured to show is that the affairs of the plaintiffs were in a state of embarrassment and difficulty, which made the sale inevitable; that before the contract another solicitor was called in and acted for the plaintiffs; that an adequate price was paid; and that, even after the contract was made, the defendants, so far from being eager in the transaction, were desirous of inducing any person to take the purchase off their hands, and actually offered it to the plaintiffs' creditors, who refused to take it. There is a great deal of evidence on both sides on these grounds of defence. When fairly weighed the evidence does not remove the difficulties in the defendants' case.

As to the intervention of Crosby, who was the person called in to act and to succeed the defendants as solicitor for the plaintiffs, its importance must depend

on the way in which he performed his duty. He has been examined as a witness on behalf of the defendants, but it does not appear that he had sufficient information as to the state of the plaintiffs' affairs, or the circumstances or value of the property, to make his intervention or approbation of the sale of much value. He made no adequate exertion and took no proper pains to inquire into and ascertain the value of the property, and made no attempt to procure any other person to purchase.

The pretext for the sale was the pressure of the mortgagees, who were the defendants' clients, and whose interest was in arrear. If Crosby had made proper inquiry of the defendants, and they had told him the truth, he would have ascertained that they had in their hands a sum of money advanced to them for the purpose of being lent to the plaintiffs, which, if the defendants had chosen, would have relieved the pretended pressure, and he might also have discovered that the mortgagees had not instructed the defendants to threaten to sell the property.

The proposal of the defendants to become purchasers appears to have been contemporaneous with their ceasing to act themselves as solicitors for the plaintiffs and with the employment of Crosby. In the answer (paragraph 35) the 23rd of November, 1855, is fixed as the date on which they ceased to act as solicitors for the plaintiffs, and on which Crosby appeared. On the following day there occurred an interview between the defendants and Crosby, the particulars of which are stated in the answer. They say that Mr. Crosby requested to be informed of the state of the mortgage and other transactions between them and his clients; that they gave him such information, and among other things they stated the impossibility of their clients remaining any longer unpaid, and requested him to see if any means

1862.
GIBBS
v.
DANIEL.
—
Judgment.

1862.
GIBBS
v.
DANIEL.
—
Judgment.

could be found to pay the interest and prevent the necessity of a sale, which they said was inevitable unless this could be done. The proposition that the defendants should become purchasers was, they say, started by Crosby. In a previous passage they say that the proposition was started after several interviews with Crosby. Upon that proposition they offered to purchase, and in paragraph 37 is this passage:—"We admit that we had intimated to him that unless the plaintiffs Mary Bryant Gibbs and Ann Gibbs, on or before the 11th day of December, but not otherwise, immediately accepted our offer, we would instantly advertise the property for sale."

It appears, however, that all this urgency and all these threats proceeded entirely from the defendants themselves, and had no foundation in any instructions or wish of their clients, the mortgagees. This is clearly established by their own evidence. They admit that no written notice was given to any of them by the mortgagees to sell, that the mortgagees left the entire management of the mortgage securities in their hands, and that the statement that they would proceed instantly to advertise the property for sale was made solely because no means could be found whereby the interest due on the mortgages could be paid or secured. This last statement has been displaced by documentary evidence and by the *vivâ voce* examination of the defendant Cox as to the moneys in the defendants' hands, received by them in respect of a loan negotiated in July for the plaintiffs, and left uncompleted for some reason incompatible with their duty to the plaintiffs, then their clients.

It is thus clearly proved that, while the non-payment of interest was the pretext for compelling an instant sale, they had in their hands moneys which their duty to the plaintiffs as their clients required them to make available for that purpose. When Crosby was called in to act in

their stead as the plaintiffs' confidential adviser, they withheld from him the knowledge of this and other facts essential to enable him to discharge his duty with effect. Where a purchase of this kind is defended on the ground of the intervention of other professional assistance, it must be shown that the new adviser had a proper opportunity of discharging his duty.

If it appears that the solicitor purchasing from his late client is aware of a neglect of duty, or takes advantage of any neglect of duty, in the new adviser, but especially if he withholds or suppresses from the new adviser any information of importance, the transaction is vitiated. The intervention of one who is seen or known to neglect his duty is no protection.

In the present case the defendants used for their own benefit against their former client's information obtained by them while acting as their professional advisers. The defendants are shown to be purchasers of the property of their late clients, under a forced sale, forced under a pressure created by themselves. They only ceased to act as solicitors for the plaintiffs at the time when they offered to purchase their estate, and they continued the pressure under a power which they themselves created till they completed the purchase, and they completed at the time when they had secured to themselves a large profit from a transaction of which the negotiation was commenced while their confidential relation with the plaintiffs existed, and concluded, not for the benefit of the plaintiffs, but of themselves.

Throughout the transaction the plaintiffs were placed wholly at the mercy of the defendants. The threats and pressure and alarm were all the work of the defendants, and the means by which they procured the plaintiffs to make the contract. Except for the purpose of procuring a sale to themselves, there appears to be

1862.
GIBBS
v.
DANIEL.
Judgment.

1862.

GIBBS

v.

DANIEL.

Judgment.

no reason at all for their assertion that a sale was inevitable, and no other reason why they threatened that they would instantly advertise the property for sale unless their offer to purchase was accepted.

The profits which the defendants have derived from their subsequent dealing with the property is the best proof of value. Evidence of a great depreciation of the property from temporary causes at the time of the contract affords little assistance to the defendants' case.

A purchase of mortgaged property by the solicitor of the mortgagee at a time of temporary depreciation of the property without any instructions from the mortgagee, or any purpose of apparent benefit, to him can scarcely be a valid transaction.

Objections have been taken as to the state of the plaintiffs' title to the property, but these objections are of no material importance on the main question in the cause. It sufficiently appears that the trust funds in which all the plaintiffs were interested had been irregularly dealt with as to the investments in the property in question; but the nature of the dealing was such as to give to all the plaintiffs such an interest in the property as entitles them to maintain the suit. The objection that the son is not a party to the suit is of no avail. It does not appear that he could properly have joined as a plaintiff, and it is not shown that he retains any interest in the property sufficient to make his absence as plaintiff or defendant in this suit an obstacle to the plaintiffs' right to relief. He was no party to the contract and conveyance which are sought to be set aside. It is scarcely necessary to notice that what is said by the defendants to have been an offer by them to the creditors of the contract was an offer of a different kind, including other property and on other terms. It is sufficiently proved that the defendants before their purchase were well aware that there was an opportunity of selling a

small portion of the ground for a large sum, and they so managed as to prevent the plaintiffs from having the benefit of this advantageous proposal, and reserved that benefit to themselves.

Throughout the whole of the transaction the conduct of the defendants was a series of pretexts. The urgency of the mortgagees was a pretext; the insufficiency of the security was a pretext; the threat of advertising the property for immediate sale at the instance of the mortgagees was a pretext; and all these pretexts were used before their confidential relation with the plaintiffs was dissolved.

Upon the whole case the plaintiffs have established a right to set aside the transaction, and to have a decree against the defendants with costs.

1862.
GIBBS
v.
DANIEL.
Judgment.

The decree was enrolled, and the defendants gave notice of appeal to the House of Lords; the costs were, however taxed, but before payment the defendants served on the plaintiffs the following notice:—

“Take notice that this Honourable Court will be moved, before his Honour the Vice-Chancellor Sir John Stuart, on the 23rd day of April instant, or so soon after as counsel can be heard on behalf of the defendants, that all proceedings in this cause under the decree made in this cause by his Honour the Vice-Chancellor Sir John Stuart, and dated the 3rd day of May, 1862, may be stayed pending the appeal presented by the said defendants to the Lords Spiritual and Temporal in Parliament assembled, or that all proceedings under the said decree as regards the enforcing the payment of the costs of the suit by the said decree directed to be taxed and paid, may be stayed pending the said appeal; or that his Honour may be pleased to make such further or other orders as he shall think fit.

“Dated this 20th day of April, 1863.”

The Vice-Chancellor refused the motion with costs; but on appeal, heard on the 1st May, 1863, the Lords Justices made the following order.—

“Payment of the costs to the solicitor ordered upon personal security being given to return same if ordered, or upon an undertaking

1862.

GIBBS

v.

DANIEL.

Judgment.

being given by the solicitor to abide by such order as the Lords Justices may make after the appeal is decided in the House of Lords; if no security or undertaking given, payment into court. Order of Vice-Chancellor as to costs of the motion before him to stand. Reserve costs of the appeal."

1862.

July 19.

SAMUDA v. LAWFORD.

Where a lessor agreed to let a house and to put it in decorative repair, but refused to fulfil his contract, the Court at the instance of the lessee decreed specific performance of the agreement, with an inquiry whether the agreement as to decorative repair had been performed; and if not, decreed that the defendant should compensate the plaintiff in damages.

IN February, 1862, the plaintiff entered into negotiations with the defendants J. E. Lawford and Caroline Kelly, in respect to a dwelling-house and the appurtenances, situate in Dartmouth Park Road, numbered 3. The arrangement was, that the plaintiff should take the house for a period of three years from the 25th of March, 1862, at the yearly rent of 50*l.*, but the plaintiff before concluding the contract required that certain specific alterations and repairs should be first done. William Lawford, a connection of the defendant J. E. Lawford, and who acted as defendant's agent, sent to the plaintiff a printed form of agreement for the letting of a house filled up, but the plaintiff, being dissatisfied with such printed form, altered it to meet his views of what he was entitled to, and returned it to William Lawford on the 21st of February, 1862, with the following remarks:—

"I have made such alterations in the inclosed form as will, I believe, make it embody our reciprocal stipulations and carry out the understanding between us. The agreement might, no doubt, be much shortened, but I thought you would prefer retaining as much as possible of the printed form. It would have swollen the document to

an unreasonable length to detail the particular matters agreed upon as between us, to be attended to in the house, which for exactness sake I recapitulate here." The plaintiff then specified several things which he required to be done, and proceeded thus:—"I mention these matters as having already engaged our attention, but, of course, if any other trifling defects which may have escaped our cursory survey the other day should exist, Mr. J. E. Lawford will remedy them; and now I think of it, it seems to me that the paper in the passage is torn or defaced in several places."

On the 25th of February, 1862, the defendant J. E. Lawford, in a letter of that date addressed to the plaintiff, made the following observation:—

"I presume the rain-water cistern will be sufficiently large if it hold sixty or seventy gallons. The paper will be repaired as requested, and all other matters to meet your requests in your letter of the 21st."

By an agreement dated the 25th of February, 1862, and made between the defendants of the one part and the plaintiff of the other part, the defendants agreed to let, and the plaintiff agreed to take, the said messuage or tenement the premises, with the appurtenances, for the period of three years, &c. And it was among other things agreed, that on the expiration or determination of the tenancy the plaintiff would quietly deliver up the messuage or tenement, &c., to the defendants or their agents acting in their behalf, in as good repair and condition as the same then were in, reasonable wear excepted; the defendants nevertheless putting the premises in substantial and decorative repair, and keeping the same so during the term thereby created.

After the execution of the agreement the plaintiff entered into occupation of the premises, which he still retained. The bill, which was filed on the 12th of May, 1862, alleged that he entered into possession in the full

1862.
SAMUDA
v.
LAWFORD.
—
Statement.

1862.
—
SAMUDA
v.
LAWFORD.
—
Statement.

expectation and belief that the premises would be put in complete, substantial, and decorative repair, and that the additions and repairs required by the plaintiff and specified in his letter of the 21st of February, 1862, and agreed to be made and done by the defendants, would be made and done by them in accordance with the agreement and the letter of the defendant Lawford of the 25th of February, 1862. He insisted that the defendants were bound to make such additions and do such repairs, and that divers other repairs were required to the premises, to the paint and paper in various parts of the premises, the cielings in various rooms and passages to be made good, handles and keys to certain doors, that the gratings to the drains throughout the outer part of the premises, bell-wires and iron work to the gates, required to be renewed; and he submitted he was subjected to considerable inconvenience and injury, and was deprived of the reasonable and beneficial use, occupation, and enjoyment of the house and premises in consequence of such additions not having been made, and of such repairs not having been done.

The bill prayed that the defendant might be decreed specifically to perform the agreement of the 25th of February, 1862, and to put and keep the premises into substantial and decorative repair, and in particular to make the additions and do the repairs specified in and required by the plaintiff's letter of the 21st of February, 1862, including the repairs referred to in the 6th paragraph of the bill, and that damages might be awarded to the plaintiff in respect of the breach and nonperformance of the agreement by the defendants, and in respect of the refusal of the defendants to make such additions and do such repairs to the premises.

The defendant J. E. Lawford, by his affidavit, deposed that the material portion of the repairs agreed to be done by him were done, and that he always was ready and

willing to do the repairs not already done, which, however, were so trivial that the plaintiff could not possibly have sustained an injury, inasmuch as the whole of them could be completed for less than the sum of 3*l*.

In reply an affidavit was made on behalf of the plaintiff by a builder, &c., that he had carefully inspected the house and premises, and the repairs which still remained undone would, in his opinion, cost the sum of 15*l*. or thereabouts.

Mr. *Bovill*, for the plaintiff, contended that the plaintiff was entitled to a decree for specific performance of the agreement on the faith of which the plaintiff had entered into possession of the house. It was submitted that under its improved jurisdiction the Court had power to compensate the plaintiff for the damage he had sustained by reason of the defendant's neglect to fulfil his contract.

Mr. *Shebbeare*, for the defendant, contended that the plaintiff might have obtained at law the full benefit of the agreement; and if so, the bill ought to be dismissed: *Clayton v. Illingworth* (a). In *Taylor v. Portington* (b) it was held that an agreement to take a lease of a house if put into thorough repair and the drawing-room handsomely decorated according to the present style was too uncertain for the Court to enforce. In *Norris v. Jackson* (c) it was held on demurrer that a repairing contract was too vague to be enforced (d). In *Brace v. Wehnert* (e) an agreement to grant a lease of a house when built according to a plan to be approved of (no plan having been approved) was held too vague, and the bill was dismissed with costs.

The VICE-CHANCELLOR.—The stipulations in the agreement are not conditional. The agreement is, to put

1862.
SAMUDA
v.
LAWFORD.
Statement.

Argument.

Judgment.

(a) 10 Hare 451.

(b) 7 De G. M. & G. 328.

(c) 1 John. & H. 319.

(d) See *Antè* (Giff.), vol. iii.
p. 396.

(e) 25 Beav. 348.

1862.
 SAMUDA
 v.
 LAW FORD.
 ———
Judgment.

the premises in substantial and decorative repair, and it is sufficiently definite for the Court to execute. The case of *Taylor v. Portington* was a very peculiar one, but the language of the agreement in that case was very different from that in the present. In addition to the power of the Court to decree specific performance, the Legislature has said that the Court may award damages. The duty of the Court is to decree specific performance, and to direct an inquiry whether the agreement as to decorative repairs has been performed; and if not, to award damages. The defendants must pay all the costs.

1862.
 July 15.

PHILLIPPS v. THE LONDON, BRIGHTON,
 AND SOUTH COAST RAILWAY COM-
 PANY.

The 10th section of the Railway Clauses Consolidation Act authorises the permanent diversion of public roads, and not only a temporary diversion for the purpose of constructing the railway; and the Court dismissed a bill filed for an injunction to restrain such diversion.

THIS bill was filed by George Phillipps, the owner of Streatham Park, in the parish of Streatham, in the county of Surrey, for the purpose of obtaining an injunction restraining the London, Brighton, and South Coast Railway Company from diverting the road called the Mitcham Road, or any part thereof, save for such temporary purpose as was authorised by their Act of Parliament, and also from leaving a cutting in Mitcham Lane uncovered by a bridge for a longer period than should be necessary for building a bridge for carrying a road over the railway at Mitcham Road, in accordance with the deposited plans and their Act of Parliament, and from blocking up the Mitcham Road, or any part

thereof, and from making fences on the said road, except for the purposes of forming the railway and building the bridge for carrying the said Mitcham Road over the railway, in accordance with their Act.

The bill further prayed that the damage done to the plaintiff by diverting the said road in manner aforesaid, might be ascertained under the direction of the Court, and that the company might be decreed to make good the amount to the plaintiff.

Streatham Park was bounded on the southern side by the Mitcham Road, having a frontage to the said road very valuable for building purposes. The bill alleged that in the session of Parliament of 1859 and 1860 the railway company brought in a bill to authorise the construction of a line of railway from the London, Brighton, and South Coast Railway, in the parish of Croydon, to the West End of London and Crystal Palace Railway, in the parish of Streatham, and that the proposed line would intersect Streatham Park, and divide Mitcham Road.

The bill alleged that the company, in order to prevent the plaintiff's opposition, entered into an agreement with him whereby they agreed to buy about three acres of freehold land for 3200*l.*, and about six acres of copyhold land at the rate of 200*l.* per acre, "which said sums were to include all damage for severance or otherwise."

The bill alleged that, according to the plans deposited by the railway company, the line of railway would cut the Mitcham Road at right angles, by a deep cutting in Mitcham Lane; that the company were bound to erect a bridge to carry the road over the railway so as to unite the portions of the Mitcham Road as directed by the Railway Clauses Consolidation Act, 1845; and that the company had no power to divert the road for other than certain temporary purposes mentioned in the said Act.

The bill alleged that shortly before the 20th of January, 1862, the company determined, instead of building a bridge

1862.
 PHILLIPS
 v.
 THE LONDON,
 BRIGHTON,
 AND SOUTH
 COAST
 RAILWAY
 COMPANY.
 —
Statement.

1862.
 PHILLIPS
 v.
 THE LONDON,
 BRIGHTON,
 AND SOUTH
 COAST
 RAILWAY
 COMPANY.
 —
Statement.

according to the deposited plan for the purpose of carrying the road over the railway, to divert the road itself; and accordingly they commenced works for the purpose of diverting the Mitcham Road for a distance of 600 feet, beginning about 500 feet to the eastward of the intended cutting, and terminating about 100 feet to the westward of the same, whereby the road would no longer form the boundary of the Streatham Park Estate, and there would be interposed a piece of land between the Streatham Park Estate and the new road. The plaintiff would thus be deprived of his frontage to the road which formed the boundary to the Streatham Park Estate.

The bill was filed on the 6th of May, 1862. It appeared in the evidence that on the 20th of January the plaintiff's solicitor wrote to the company's solicitors, stating that, for the injury thus done to Mr. Phillipps, he might justly require compensation, or he might insist on the company forming the railway in strict conformity with their deposited plan. He was not, however, desirous of doing either of these things, but would be satisfied if the full right in perpetuity to the abandoned portion of the road were made over to him by the company, and which, as it could be of no value to the company, it was presumed they could have no hesitation in doing.

On the 27th the plaintiff's solicitor again wrote to the defendants' solicitors, saying, that what Mr. Phillipps required to be given was all the land that would be left between the park and the newly-formed road. On the 19th of March the plaintiff's solicitor wrote again, asserting that the company had no right to divert the road, and threatened proceedings unless some equitable arrangement could be come to: other claims were also made.

On the 20th of March the company, by their solicitors, wrote, denying that the company had no right to divert the Mitcham Lane Road as they were doing, though they admitted that when the road was diverted it might become

a question whether Mr. Phillips was entitled to any compensation for injury done to his property by such diversion, and they felt sure the company would meet any claim in a liberal spirit. The agreement, however, stipulated that the money paid to Mr. Phillips was to include all damage by severance or otherwise.

On the 5th of May the company's solicitors wrote as follows :—

1862.
 PHILLIPS
 v.
 THE LONDON,
 BRIGHTON,
 AND SOUTH
 COAST
 RAILWAY
 COMPANY.
 —
 Statement.

“ With reference to the proposal made by you some time ago that the company should give to Mr. Phillips the strip of land between the diverted road in Mitcham Lane and his park fence, we are now in a position to propose this to the board, and we will do so if your client still desires to have the land. We should say that the board would meet his wishes.”

On the next day the plaintiff's solicitor wrote to the company's solicitors stating that a bill was ready to be filed, and the plaintiff was not then inclined to come to such favourable terms as he would have been willing to accept at the beginning of the correspondence, being advised that the company were liable to him in damages for the deterioration which their proceedings had caused. At the same time he should be glad if terms could be come to to stop litigation, and with that view the plaintiff's surveyor would wait upon the defendant's solicitors in the course of the day.

On the same day the latter wrote to say that the company's engineer made no objection to the strip of land being given up to the plaintiff. They should therefore advise the board that it be given up. They had much pleasure in acceding to the request, and would advise the board it ought to be given up.

On the 6th of May the bill was filed, and on the following day the company's solicitors wrote to the solicitor

1862.
 PHILLIPS
 v.
 THE LONDON,
 BRIGHTON,
 AND SOUTH
 COAST
 RAILWAY
 COMPANY.

of the plaintiff repeating the offer as to the land, but observing that the plaintiff must not do anything to injure the embankments or roads. They said that, having offered the plaintiff all he asked, they could not conceive why he preferred to file a bill. They added, that if the plaintiff declined the offer and put the company to expenses, they must stand on their strict rights.

Argument.

Mr. *Greene* and Mr. *Martindale*, for the plaintiff, contended that by the 16th section of the Railway Clauses Consolidation Act, 8 & 9 Vic. c. 20, the company were only authorised to make a temporary diversion for the purposes of their railway, and were not authorised to make a permanent diversion of roads not in conformity with the deposited plan.

Mr. *Malins* and Mr. *Dickinson* contended that the 16th section of the Act empowered the company to make a permanent diversion of roads, if necessary for the construction of the line.

Mr. *Greene* was heard in reply.

Judgment.

The VICE-CHANCELLOR:—

It is plain that the plaintiff has sustained very serious damage, for which he is apparently entitled to have a proper reparation made. The real question is as to the jurisdiction of the Court to grant an injunction upon the ground that a public road has been improperly diverted. The bill prays for an injunction to restrain the defendants “from diverting the said road, called the Mitcham Road, or any part thereof, in manner aforesaid, or in any manner save for such temporary purpose as is authorised by the said Act of Parliament;” and “from leaving the said cutting in the said Mitcham Lane uncovered by a bridge for any longer period than shall be necessary for building

a bridge for carrying the road over the said railway at the Mitcham Road, in accordance with the deposited plans and the Act of Parliament." The right to an injunction must depend on the plaintiff being able to show that what the defendants have done is something exceeding the powers conferred upon them by the Legislature. After reading the clauses of the Railway Clauses Consolidation Act, I have no doubt that the company were authorised to divert a public road; and if that be so, the Court has no power to grant the injunction; and if the Court has no power to do that, the plaintiff's case must fail, and the bill be dismissed. But, as to the costs, this litigation has been carried on in a manner not at all creditable to either party, and the bill will therefore be dismissed without costs.

1883.
PHILLIPS
v.
THE LONDON,
BRIGHTON,
AND SOUTH
COAST
RAILWAY
COMPANY.
Judgment.

WETHERELL v. WETHERELL.

July 21 & 22.

WILLIAM DE CAULIER made a holograph will, dated the 13th of September, 1855, which, as admitted to probate, was as follows:—This is the will and testament of William de Caulier, resident at No. 3, Terrace, New Norfolk Street, Islington, in the county of Middle-

Where a testator directed the annual interest of his residue to be divided into as many shares as there were living children of T. and

L. W., share and share alike, as they should come of age; and in case any one should die without children, his share to devolve on survivors successively, till the whole interest came into the hands of the grandchildren and great grandchildren of T. and L. W.—*Held*, that the children of T. W. living at his death were entitled to the income only, but that there was a gift by implication to these children absolutely, with a gift over of the share of any grandchild who had died without having had issue; not absolutely, but according to the gift of the original share.

Where a testator, having granted an annuity to his widow, under his will directed that if she persisted in any claim on the residue of his property she was to forfeit the annuity—*Held* the widow was not put to her election, but was entitled both to her dower and to the annuity

1802.
WETHERELL
v.
WETHERELL.
—
Statement.

sex. As it may please the Almighty God to remove me from this present state at any time He himself may judge most fit, I therefore write out the following declaration as my will and testament. After all my just debts and funeral expenses, and the various legacies, donations, &c., herein specified are fully paid and settled with all the parties concerned therein, my will is, that the annual interest only of all the residue of my property, of whatsoever kind or wheresoever placed, shall be divided into as many equal parts or shares as there may be children living and begotten of the body of Thomas Nathaniel Wetherell, surgeon, at Highgate, in the county of Middlesex, on the body of his present wife Louisa Wetherell, share and share alike, as each of the said children come of age. And, in case any one of the said children shall die without any children of their own lawfully begotten, then in that case his or her share of the said annual interest (as the case may be) shall devolve to the surviving children, share and share alike, and so on successively until the whole amount of the said interest of the said residue comes into the hands of the grandchildren and great grandchildren of the above said Thomas Nathaniel Wetherell and of his wife Louisa Wetherell. As to Phœbe de Caulier, to whom I was formerly married, as she has by inheritance on her mother's side a sufficient sum to live upon, I will and bequeath to her (upon condition of her making no claim whatever upon the residue of my property) I will and bequeath to her the usual annuity of 28*l.*, i.e. twenty-eight pounds sterling, to be paid to her by my executors half-yearly, on demand, during her lifetime only; after her decease the principal thereof will become part of the residue of my property; but if the said Phœbe de Caulier makes and persists in any claim upon the residue of my property after my decease, I will and bequeath unto her no part of my property, and the said annuity of 28*l.* sterling shall not

be paid. And my will is that all casual property reverting to my estate, whether of leasehold or of copyhold property, mortgages, policies of life assurance, ground-rents, &c., that shall fall in, or be advisable to call in, shall, as soon as the amount thereof is obtained, be immediately invested in the best Government securities, the interest thereof to be received for and on behalf of the aforesaid children of the said Thomas Nathaniel Wetherell and Louisa Wetherell, his wife. And I do will and bequeath the sum of to Maria Wetherell, and the sum of to Jane Gibson Wetherell, and the sum of to Mr. James Paxon and his wife, and the sum of to Mr. and Mrs. William Paxon, and the sum of to each of my executors for their trouble on my behalf, and all legal and just costs and expenses attending and requisite for the due discharge of

1862.
WETHERELL
v.
WETHERELL.
Statement.

. And I do nominate and appoint Mr. Thomas Nathaniel Wetherell, surgeon, of Highgate, to be one of my executors, and Mr. . Signed by myself this 30th day of September, in the year of our Lord One thousand eight hundred and fifty-five.

“ WILLIAM DE CAULIER.

“ In the presence of

“ Mary Dallisor, 24, Halliford Street, Islington;

“ Henry Edis Webster, 24, Halliford Street, Islington.

Witnesses to this my act, deed, and signature.”

The testator died on the 20th of April, 1861, and after his death the will, with certain words written in the places where the blanks in the draft were left, in his own handwriting in pencil, and an unattested codicil also in his own handwriting, were found in his house; but the Court of Probate refused probate of the codicil and of the pencil additions, and on the 11th of June, 1861, probate of the will, without the pencil additions, was granted to the plaintiff.

1862.
 WETHERELL
 v.
 WETHERELL.
 —
Statement.

Phoebe de Caulier survived the testator. They never had more than one child, which died a hours after its birth. The testator had a brother and sister, but they both died in his lifetime without having been married.

The plaintiff Nathaniel Thomas Wetherell (in the will called Thomas Nathaniel) Wetherell was a relative of the testator, but whether next of kin at his death, or who was or were his next of kin at his death, the plaintiff did not know. The plaintiff had had seven children by his wife Louisa Wetherell (three of whom had attained the age of twenty-one years, and four were infants), and one grandchild, a son of his eldest son. All the children and grandchild were living at the testator's death, and all were defendants.

The testator at his decease was possessed of considerable personal estate, and seised of a freehold estate; he was also the owner of a small copyhold property held of the manor of Stepney.

The defendant Phoebe de Caulier (the testator's widow) alleged that, according to the true construction of the will, the testator died intestate as to some part or interest at least in his personal estate and freehold and copyhold property, and she claimed, as his widow, to be entitled to her dower out of the freehold and copyhold estates, and to one equal third part or share of the personal property.

The bill prayed for certain declarations, with the usual administration decree.

Argument.
 —

Mr. *Bacon* and Mr. *G. L. Russell* for the plaintiff, asked for the usual administration decree, and the declaration of the rights of the parties.

Mr. *Malins* and Mr. *Pemberton*, for those children who had attained twenty-one, contended that the whole of the income was divisible among them until some other child should attain twenty-one, when it would have to be again

divided according to the then number of shares, and so on until all the children had attained twenty-one.

Mr. *Freeman*, for the infants, submitted that all the children who were living at the death of the testator were absolutely entitled.

1862.
WETHERELL
v.
WETHERELL.
—
Argument.

Mr. *Eddis* appeared for a grandchild.

Mr. *Greene* and Mr. *Springall Thompson*, for the widow, contended that there was nothing in the will to put her to elect between the annuity and her dower. The claim for dower was wholly independent of the will, and did not conflict with it, and in such case a provision in the will did not disentitle the widow from dower: *Pickering v. Lord Stamford*(a).

Mr. *Craig*, for James Paxon, one of the next of kin, contended that the gift was void for uncertainty and remoteness: *Gooch v. Gooch*(b).

Mr. *J. H. Palmer* and Mr. *Woodhouse*, for another of the next of kin, took the same view, and cited *Bastin v. Watts*(c), *Bell v. Blann*(d), *Wordsworth v. Wood*(e).

The VICE-CHANCELLOR :—

Judgment.

The first question seems to be whether or not the testator has disposed of his real as well as of his personal estate, and I think, considering that in the latter part of the will he speaks of the “casual property reverting to the estate whether of leasehold or copyhold,” it is impossible to hold that the testator did not intend by his will to dispose both of his real and personal estate. In this

(a) 3 Ves. 331.

(b) 14 Beav. 565.

(c) 3 Beav. 97.

(d) 5 De G. & Sm. 658; s.e.
2 D. M. & G. 775.

(e) 2 Beav. 25; s.c. 1 H. of
L. Ca. 129.

1802.
WETHERELL
v.
WETHERELL.
—
Judgment.

case, as in the cases cited, the first duty of the Court is to give effect to the testator's language, according to the most plain and rational meaning which can be ascribed to it. It is a fundamental rule of construction, where a will plainly mentions persons who are the objects of the testator's bounty, to construe it in such a way as if possible to avoid an intestacy. That is the general rule, in support of which no case need be cited: it pervades every case where the Court has to construe a will. Another rule is that, where there are words which in themselves have a plain, clear, and sensible meaning, they are not to be controlled by any words or expressions which are more obscure or ambiguous. The first question is as to the widow's right to dower, and it seems to me that she is clearly entitled to dower. No case of election can arise, for the testator's language is that "If she makes and persists in any claims upon the residue of his property, she is to forfeit the annuity of 28*l*." That refers to some claim made in his lifetime, and could not be a claim for dower. Therefore it seems to me that no case of election arises, and that the widow is entitled to dower, and also entitled to the annuity bequeathed to her by the will. The next question is of very considerable difficulty. Although the testator speaks of all the residue of his property, and although he speaks, in the clearest terms, of the children and grandchildren of the present plaintiff as the objects of his bounty, yet, except by implication, there is little or nothing to be found in the will that amounts to a clear and absolute gift. His first direction is, that "the annual interest only of all the residue of my property, of whatsoever kind or where-soever placed, shall be divided into as many equal parts or shares as there may be children living and begotten of the body of Thomas Nathaniel Wetherell on the body of his present wife Louisa Wetherell, share and share alike, as each of the said children come of age." The direction

there to divide the whole annual interest of the whole of his property is clear and express.

The number of shares is to be equal to the number of children of the persons named who should be living at his death. There seems no doubt so far; but, when he says, "as each of the said children come of age," there are no words of gift to any except by implication. It has been contended that the division is, at first, to be only among those children who are of age at the time of the testator's death. There are seven children, three of whom were of age at the testator's death, and it is suggested that there is to be a division of the property (in the events that have happened) in three shares, then when the next child comes of age into four shares, and so on. There certainly is no direction to that effect in the will, and it is difficult to reconcile that construction with the language of the testator. I cannot reject the words "into as many equal parts or shares as there may be children living and begotten," which must mean at the time of his death, and that amounts to a direction to divide into seven shares. But the words "as each of the said children come of age" are said to mean that there is to be no gift to any child till he or she comes of age. That would be so if these words "as each comes of age" were incorporated with a gift; but the difficulty of the will is, that there is no gift here at all except by implication, and these words, not being incorporated into any gift, cannot, in my opinion, be read in the sense contended for, but must be dealt with as well as may be so as not to occasion any construction incompatible with what is clear.

The meaning of the next words seems reasonably clear. They are "in case any one of the said children" (that would be in this case any one of the seven) "shall die without any children of their own lawfully begotten, then in that case his or her share of the said annual

1862.

WETHERELL

v.
WETHERELL.

Judgment.

1862.
 WETHERELL
 v.
 WETHERELL.
 Judgment.

interest (as the case may be) shall devolve to the surviving children share and share alike." By the effect of these words the share of any child dying without having had a child is to go to the surviving children. There is clearly involved in that a gift by implication to the children of a child, because it is only the share of the child who dies without having had any children that is to go over. In that is involved, therefore, as it seems to me, upon the principle of construing gifts by implication, a gift by implication to the children of such of those children of the plaintiff as shall have children.

It has been contended that there is no gift here of the *corpus* of the property, but only of the income, and that there is no gift of the income to anybody but for a life estate. It is very well settled the words "the whole interest," or "the whole rents and profits," uncontrolled, will carry the absolute interest as to personal property, and the fee simple as to real estate. But here, in the first gift to the children, they are, I think, controlled by the word "only." "The annual interest only" is what is to be given, or, rather, what is dealt with by the testator when he speaks of the children living at his death. But, as he proceeds, and introduces words of gift over in the event of a child dying without any children of his own, the word of qualification "only" is left out, and, in a subsequent part of the will, where as to particular parts of his property there is a direction to call it in and invest it, the investment is said to be for the benefit of the said children, that is, the children who are the objects of his bounty; and his expression is, "to be immediately invested in the best Government securities, the interest thereof to be received for and on behalf of the aforesaid children." There are no words of limitation there; the word "only" is dropped; and as the testator speaks of the whole of his property and of certain persons, clearly indicating them as the objects of his bounty, it seems to

me that I should transgress a sound rule of construction if I were to hold that there was here only a gift of income, and merely a gift to the objects of his bounty of life estates.

1869.
WETHERELL
v.
WETHERELL.

Judgment.

The subsequent part of the will, in which he uses language speaking of great-grandchildren, no doubt creates a difficulty, but that difficulty is very much removed by considering that in the language used in that part of the will there is no clear gift to great-grandchildren, or to grandchildren at all. They are merely words explanatory of his hope as to the future enjoyment of his property, for he says, "and so on successively until the whole amount of the said interest of the said residue comes into the hands of the grandchildren and great-grandchildren of the above said Thomas Nathaniel Wetherell and of his wife Louisa Wetherell." I can only construe these words as meaning that he looked forward into futurity to the time when the children and grandchildren and great-grandchildren should enjoy it. But there are no express words of gift to the great grandchildren, and I am not at liberty, because he mentions great-grandchildren and uses towards them no express words of gift, to strain the language of the will so as to defeat that which seems to me his plain meaning, namely, to give the children living at his death and the children of those children interests in his property.

Upon the whole, therefore, notwithstanding the difficulties of construction, it seems to me that the meaning of the testator was to give the income only of his real and personal estate to all the children of the plaintiff who should be living at his death; that there is a gift by implication to the children of those children; and, there being nothing to restrain it, that that gift carries to them absolute interests. But there is a clear gift over in the event of any of the children dying without ever having had a child, and a gift over to the survivors, not abso-

1862.
WETHERELL
v.
WETHERELL.
—
Judgment.

lutely to those who are only to take as tenants for life, but the accruing share is to go according to the same limitation of interest as the original share which is given by the will. I propose, therefore, to make the decree in these terms:—"Declare, that the widow is entitled to her dower, and also entitled to the annuity of 28*l.* bequeathed to her by the will. Declare that, according to the true construction of the will, all the children of the plaintiff by Louisa his wife, in the will named, living at the death of the testator, became entitled to the whole annual interest, rents, and profits of the clear residue of the real and personal estate of the testator as tenants in common for life, with remainder to all the children of such children as tenants in common absolutely, *per stirpes*, as to the personal estate, and as to the real estate as tenants in common in fee, *per stirpes*; but in case any of the said children of the plaintiff shall die without ever having had any child, his share to accrue and belong to the surviving children for their lives, and the children of such surviving children, according to the above declaration.

1802.

*November 7,
8, 9, 10, 11,
12, & 13.*

SEATON v. STANILAND.

UNDER the will of George Althas, of Brotherton, Yorkshire, who died in 1819, Edward Watson and George Althas Staniland became tenants in common in tail of certain estates situate at Brotherton. They entered into partnership as lime-burners on the property, which consisted chiefly of extensive lime quarries.

In 1844 Edward Watson withdrew from the partnership, and by deed of the 15th of July, 1844, the property was demised to George Althas Staniland for fifty years, if Edward Watson should so long live; and at the same time Staniland purchased his late partner's interest in the business plant, stock-in-trade, tramroads, and everything belonging to the business. At this time there was no steam machinery on the premises.

In July, 1845, G. A. Staniland died in insolvent circumstances, being indebted to the amount of 14,367*l*. Part of the assets was the above lease. An arrangement was come to by some of the principal creditors who were friends and relations of the deceased, and ultimately a partnership was formed among them under the style of William Staniland & Co.

In pursuance and further execution of the same arrangement, by a release dated the 1st day of July, 1846, and made between the said William Staniland, Sarah Seaton, Thomas Hawdon, and William Hawdon of the first part, and the plaintiff Preston Seaton and the defendant Matilda Staniland, widow, therein described as executor and executrix of the said testator George Althas Staniland, of the second part, after reciting that the said testator was at the time of his decease indebted to the several persons parties thereto of the first part in

Bill to rectify a lease of infant's property sanctioned by the Court, in pursuance of an agreement, by excluding certain trade fixtures alleged to have been improperly comprised in the lease, and also by expunging the covenant as to delivery up of possession of growing crops and other particulars, dismissed with costs, there being no evidence that the lease was inconsistent with the agreement, one of the lessees being the infant's guardian.

1862.
SEATON
v.
STANILAND.
—
Statement.

the several sums of money following, that is to say,—to the said William Staniland 4800*l.*, to the plaintiff Preston Seaton 500*l.*, to the said Sarah Seaton 1000*l.*, and to the said Thomas Hawdon and William Hawdon as trustees of the marriage settlement of the plaintiff Preston Seaton and Mary his wife 400*l.*, and that the remaining assets of the said testator in the hands of the plaintiff Preston Seaton and the defendant Matilda Staniland, widow, as such executor and executrix as aforesaid, applicable to the payment of his aforesaid debts, consisted of the following particulars, namely, a moiety of the said hereditaments at Brotherton, held for the residue of a term of fifty years if the said Edward Watson should so long live, created by the said indenture of the 15th day of July, 1844, and certain stock in trade, plant, fixtures, and implements of trade, book debts, chattels, and effects of and belonging to the said testator's business of a lime-burner, but which assets were wholly insufficient for payment of the said testator's said debts: And further reciting that the said parties thereto of the first part had applied to the plaintiff Preston Seaton and the defendant Matilda Staniland, widow, for payment of their said debts, which the plaintiff Preston Seaton and the defendant Matilda Staniland, widow, being unable to do, they had proposed to the said parties thereto of the first part to accept and take the said leasehold and chattel property, debts, and effects, the remaining assets of the said testator in full discharge and satisfaction of their said debts, and to give and execute to them Preston Seaton and Matilda Staniland, widow, as such executor and executrix as aforesaid such release from their said debts as therein contained, which the said parties thereto of the first part had consented and agreed to do: And further reciting that in pursuance of the said agreement the said Preston Seaton and Matilda Staniland, widow, had immediately previous to the execution of the now

stating indenture, at the request of the said parties thereto of the first part, assigned and delivered to or otherwise vested in the said William Staniland and William Hawdon upon trust for the said parties thereto of the first part the said lease and premises at Brotherton, and the said stock in trade, plant, fixtures, implements of trade, book debts, chattels, and effects, the due assignment and delivery of which said leasehold and chattel property, debts, and effects, and that the same was accepted and taken by them in full satisfaction and discharge of their aforesaid several and respective debts: They the said parties thereto of the first part did thereby severally and respectively admit and declare it was by the now stating indenture of release witnessed that for the consideration aforesaid and other the premises, and in pursuance of the said agreements, and for divers other good causes them thereunto moving, they the said William Staniland, Sarah Seaton, Thomas Hawdon, and William Hawdon, thereby remised, released, and for ever quit claimed and discharged unto the plaintiff Preston Seaton and the defendant Matilda Staniland, widow, and each of them respectively, and the heirs, executors, and administrators of each of them, and each and every of their lands and tenements, good and chattels, the aforesaid several debts so due and owing to them the said several parties thereto of the first part from the estate of the said testator George Althas Staniland, deceased, as aforesaid, and all interest in respect thereof, and all actions, suits, claims, and demands whatsoever for or in respect of or in anywise concerning the same.

In further pursuance of this arrangement a lease was executed dated the 2nd of July, 1846, and expressed to be made between Preston Seaton and Matilda Staniland of the one part, and the said William Staniland and William Hawdon of the other part. It recited that Preston Seaton and Matilda Staniland, as executor and

1862.
SEATON
v.
STANILAND.
—
Statement.

1862.
 SEATON
 v.
 STANILAND.
 —
Statement.

executrix of the testator, had contracted with William Staniland and William Hawdon for the sale to them of the premises comprised in the lease for the residue of the term, and of the testator's "stock-in-trade, plant, fixtures, barges or vessels, and implements of trade, chattels, and effects particularised and set forth in the first schedule," subject to the lessee's rent and covenants, at the price of 6700*l.*, i.e. 1500*l.* for the purchase of the said leasehold premises and debts, and 5200*l.* for the said testator's "stock-in-trade, plant, implements, and effects" particularised and set forth in the said schedule; and witnessed that, in consideration of 6700*l.* therein alleged to have been paid by William Staniland and W. Hawdon to Preston Seaton and Matilda Staniland, they the said Preston Seaton and M. Staniland assigned unto the said W. Staniland and W. Hawdon, their executors, administrators, and assigns, all and singular the moiety of the lands comprised in the lease of July, 1844, "together with all additions and improvements to the said premises, and all other the premises then held under the said lease, and all goods, rails, trams, bridges, tunnels, culverts, canals, wharfs, landings, rights, ways, members, and appurtenants," for all the residue of the term, subject to to the rent and performance of the lessee's covenants.

The first schedule to the deed was as follows:—"4340 yards of railway (single line), sixty-one lime and stone waggons, tools, wood and iron, necessary for the trade; nine horses in the trade, four vessels, two third parts or shares of another vessel called the *Two Sisters*, lime set new pits, new limed pits, and stone at the cut." The debts specified in the second schedule amounted to the sum of 542*l.* 6*s.* 5*d.*

About this time a steam engine, house, and machinery were erected on the premises, which were not specifically referred to in the lease.

Also, in pursuance and part execution of the said ar-

rangement, the said William Staniland advanced the said sum of 2000*l.*, which was applied in part payment and satisfaction of the said debts of the said testator George Althas Staniland, amounting to 6917*l.* as aforesaid, and to secure the repayment of the said 2000*l.* and interest, by an indenture of mortgage dated the 4th day of July, 1846, and made between the said William Staniland and William Hawdon of the first part, the plaintiff Preston Seaton and the said Thomas Hawdon and William Hawdon of the second part, and the plaintiff William Standerling of the third part, and executed by all parties: After reciting the said lease of the 15th day of July, 1844, and that by virtue of several mesne assignments and assurances in the law, and ultimately by virtue of the said indenture of the 2nd day of July, 1846, and made between the plaintiff Preston Seaton and the defendant Matilda Staniland, widow, of the one part, and the said William Staniland and William Hawdon of the other part, the said thereinbefore recited lease, and the premises comprised in and demised by the same, became absolutely vested in the said William Staniland and William Hawdon for all the residue of the aforesaid term of years, subject to the rent, annuity, and covenants in the said lease reserved and contained: And further reciting that the said lease and premises were so vested in the said William Staniland and William Hawdon upon trust for the said William Staniland, the plaintiff Preston Seaton and the said Thomas Hawdon and William Hawdon, their respective executors, administrators, and assigns, as tenants in common: And further reciting that an engine-house and other buildings connected therewith had then lately been erected and built on the hereditaments and premises comprised in the said recited indenture of lease, and that there had also been affixed to or placed upon, in, or about the said premises, or some part thereof, a steam-engine and boiler, together

1802.
SEATON
v.
STANILAND.
—
Statement.

1862.
SEATON
v.
STANILAND.
—
Statement.

with a quantity of machinery and other things requisite to carry off the water from the lime quarries upon the said premises, and for other purposes connected with the said trade or business: And further reciting that the said William Staniland and William Hawdon were possessed of or entitled as aforesaid to the plant, fixtures, barges or vessels, horses, and implements of trade mentioned in the second schedule thereunder written, and that the said William Staniland and William Hawdon, with the concurrence of the plaintiff Preston Seaton and the said Thomas Hawdon, had requested the said William Standering to lend them the sum of 2000*l.*, which the said William Standering had agreed to do on having the repayment thereof with interest secured in manner thereafter expressed: It was by the now-stating indenture witnessed that, in consideration of the said sum of 2000*l.* by the said William Standering to the said William Staniland and William Hawdon, with the privity of the plaintiff Preston Seaton and the said Thomas Hawdon paid as aforesaid, they the said William Staniland and William Hawdon, at the request and by the direction of the plaintiff Preston Seaton and the said Thomas Hawdon, granted, bargained, sold, and demised, and the plaintiff Preston Seaton and Thomas Hawdon ratified and confirmed, unto the said William Standering, his executors, administrators, and assigns, all and singular the moiety, lands, tenements, and hereditaments comprised in and demised by the said thereinbefore-recited lease, together with all additions and improvements to the said premises, and all other the premises then held under the said lease; and all roads, trams, bridges, tunnels, culverts, canals, wharves, landings, rights, ways, members, and appurtenances, together with the said lease; and also all and singular the said steam-engine, boilers, works, fixed and movable machinery, implements, and utensils thereunto belonging then fixed or placed upon or used in or about the

1862.
SEATON
v.
STANILAND.
—
Statement.

said premises as the same were specified in the first schedule to the now-stating indenture, and all right, title, property, interest, claim, or demand whatsoever of them the said William Staniland and William Hawdon, or either of them, in and to the same; to hold the said moiety, lands, and premises, and all and singular other the premises thereinbefore expressed and intended to be thereby demised, and all such part and parts of the said engine-house, steam-engine, and machinery as were affixed to the freehold, unto the said William Standering, his executors, administrators, and assigns, for and during all the residue then yet to come and unexpired of the term granted by the said thereinbefore-recited indenture of lease, except the last day of the said term, subject nevertheless to the proviso for redemption thereinafter contained, and to hold all such part and parts of the said steam-engine, works, machinery, and premises thereinbefore assigned, or expressed and intended so to be as were not affixed to the freehold, unto the said William Standering, his executors, administrators, and assigns absolutely, subject nevertheless to the proviso for redemption thereinafter contained. And it was further witnessed that in further pursuance of the aforesaid agreement, and in consideration of the aforesaid sum of 2000*l.* so lent to the said William Staniland and William Hawdon as aforesaid, they the said William Staniland and William Hawdon, at the request and by the desire of the plaintiff Preston Seaton and the said Thomas Hawdon, had granted bargained, sold, assigned, transferred, and set over unto the said William Standering, his executors, administrators, and assigns, all and singular the plant, fixtures, barges or vessels, implements of trade, chattels, and effects mentioned and set forth in the second schedule thereunder written or thereunto annexed, and all right, title, interest, property, claim, and demand whatsoever of them the said William Staniland and

1862.
 SEATON
 v.
 STANILAND.
 —
Statement.

William Hawdon, or either of them, of, in, or to the same; to hold all and singular the said plant, fixtures, barges or vessels, implements of trade, chattels, and effects, thereinbefore expressed and intended to be thereby assigned unto and by the said William Standerling, his executors, administrators, and assigns, thenceforth as his and their own property absolutely, subject only to the proviso for redemption thereof thereafter contained, that is to say,—a proviso for redemption on payment by the said William Staniland and William Hawdon, or either of them, their or either of their heirs, executors, or administrators, unto the said William Standerling, his executors, administrators, or assigns, of the sum of 2000*l.* with interest thereon, on a day therein named and long since passed.

The first schedule to the said last-mentioned indenture was as follows:—"One steam-engine of 4-horse power high pressure, with 4-horse boiler, the shaft of the fly-wheel working two pumps 6 inches in diameter and 39 feet long, by an eccentric movement on the face-plate, with cold water force-pump attached to the engine."

By a declaration of trust dated the 6th day of July, 1846, and made and duly executed between and by the said William Standerling of the one part, and the said William Staniland of the other part, after reciting the said mortgage of the 4th day of July, 1846, and that the said sum of 2000*l.* was the proper money of the said William Staniland, it was declared that the said William Standerling should stand possessed of the said mortgaged premises, monies, and interest in trust for the said William Staniland, his executors, administrators, and assigns absolutely.

The second schedule was in the same terms as that to the deed of lease of 2nd July.

The bill alleged that the engine, boiler, and pumps were put up after the formation of the partnership of

Wm. Staniland & Co., and at the sole cost of the firm. It also alleged that by the custom of the trade and country the steam-engine and machinery, as well as the rails, plant, and utensils, were the property of the firm as tenants' fixtures, and not the property of the landlord as landlord's fixtures.

1862.
SEATON
v.
STANILAND.
Statement.

In further pursuance of the above arrangements, and in pursuance of an agreement previously entered into, an application was made to the Court under the statute to sanction a lease by the infant George Althas Staniland, the only son of the testator G. A. Staniland, during his minority, of the moiety in the said estates, of which he was tenant in tail. A reference was made to the Master, who, after referring to the state of facts on the part of the infant in support of granting a lease, "to contain the covenants used in similar cases, and according to the custom of the country," duly made his report, which was afterwards confirmed, and it was referred back to him to settle a proper lease according to the report.

The lease so settled and approved (being the lease now sought to be rectified) was dated the 1st of December, 1846, and expressed to be made between the said G. A. Staniland the younger (the infant), of the one part, and W. Staniland and Preston Seaton of the other part; and thereby the said G. A. Staniland the younger, by virtue of the said Act of Parliament (1 Will. 4, c. 65), and with the approbation of the master, demised to W. Staniland and P. Seaton, their executors, administrators, and assigns, the said moiety of him the infant in all the freehold, copyhold, and leasehold estates at Brotherton, and of and in all and singular the engine-house and all other buildings then standing on the premises, and of and in all and singular the steam-engine, boilers, pumps, machinery, and utensils then fixed and placed in and about the said engine-house and premises, and all "roads upon which rails were then laid and used as trainroads," and all other roads,

1862.
 SEATON
 v.
 STANILAND.
 —
Statement.

bridges, &c., with liberty to bare and win stone, &c., for the term of fifteen years and six months from the 10th of January then last, the said W. Staniland and P. Seaton paying an annual sum of 200*l.* by way of surface rent, and a royalty of 1*s.* for every superficial square yard of land which should be cut or bared for stone. The lessees, among other covenants, covenanted to keep the lands, hereditaments, and premises thereby demised, and the said messuages, building, and engine-house, wharves, ditches, &c., railroads, tramroads, &c., and all and singular the engines, machinery, erections, and premises then standing and being, or which at any time thereafter should or might be erected or built upon the said premises, or from time to time substituted in the place thereof, in good and substantial order and repair, and at the expiration or other sooner determination of the term peaceably to yield up the same.

William Staniland died in April, 1852, having appointed the last three of the present plaintiffs his executors. The partnership firm of William Staniland & Co. turned out to be a losing concern, and in 1860 the business was wound up. The plaintiff Preston Seaton, on behalf of the executors, sold the iron rails comprised in the lease, with scrap iron, for 401*l.* 5*s.* 9*d.*, of which the rails produced 378*l.* 12*s.*, which sum, with the produce of the sale of horses and sundry effects of the value of 221*l.* 17*s.*, and of the sale of the engine, reduced the mortgage debt by nearly 900*l.* G. A. Staniland, the infant, died in 1846, and upon his death his moiety in the estates, subject to the lease, passed to the defendants his four sisters as tenants in tail. On the 5th of July, 1861, the infants filed a bill against Preston Seaton, Matilda Staniland, widow, and others, and alleging *inter alia* that Preston Seaton had not paid the rents since the death of the infants, but had allowed the plant to be sold, and praying for an account of rents of the moiety which they had

received, or, but for their wilful default, might have received, and for a receiver, and that Preston Seaton and other defendants might make good the loss. The lease expired on the 10th of July, 1861, and the defendant Matilda Staniland and her sisters M. J. and S. H. Staniland and Mrs. Peel and her husband shortly afterwards brought several actions on the covenants in the lease against the executors of W. Staniland, who thereupon filed this bill, asking for a decree to rectify the lease by excluding the fixtures and varying the covenants as to delivering up possession of the growing crops.

This bill prayed that the lease of the 1st of December, 1846, might be rectified, by excluding from the grant and demise thereby made the steam-engine, boilers, pumps, and machinery, the rails or tramways, and the trade plant, implements, and effects belonging to the firm of Staniland & Co., which at the date of the lease were on the premises; also as to the delivery up of possession of the property other than the lime-quarries, &c., in the occupation of the firm, by providing for the delivery up of the same, subject to the usual custom of the country; and for other consequential relief.

Mr. Bacon and Mr. G. L. Russell for the plaintiffs.— There are two points in which the lease was inaccurate: first, inasmuch as it included the engine and machinery purchased after the partnership, as a part of the infant's property; and secondly, as to the covenant for delivery up of possession of things which were the property of the lessees, either in their own right or by the custom of the country. It was quite clear there had been a mistake made by the Master, and which this Court would correct. [The VICE-CHANCELLOR.—The question would seem to be whether there had been any proposal to demise the plant.] The only proposal was to demise the infant's

1862.
SEATON
v.
STANILAND.
Statement.

Argument.

1862.
 SEATON
 v.
 STANILAND.
 —
Argument.

interest, which did not comprise the plant and machinery. The burden was on the other side to show why this Court should not correct a palpable error committed by its own officer, whereby the plaintiffs were damnified.

Mr. *Leigh Pemberton*, on behalf of the two defendants *Hawdon*, supported the plaintiffs' case.

Mr. *Malins*, Mr. *Craig*, and Mr. *C. Hall*, for the defendants.—This was the first time that the Court was asked to presume a mistake against an infant at the instance of those who were *sui juris* and acted under legal advice. The learned counsel on the other side had not referred to any case in which the Court had thus acted—no doubt because no such case was to be found in the books. [The VICE-CHANCELLOR.—It is not a question of contract, as rectifying a settlement: this is a case where the Court has approved of the instrument.] The effect of the petition is that a lease granted under the Act must be treated, analogously to property settled under the 17th section of the 1 Wm. 4, c. 65, s. 17, exactly as a lease granted by a person *sui juris*. But, even supposing the lease was granted by a person *sui juris*, the Court would not, on a mere parol statement, vary the terms: *The Marquis of Townshend v. Stangrove*(a). But here there was no evidence of error in the lease; but the error, if error there were, must be assumed to be in the agreement, inasmuch as there was nothing to show that the lease was not in conformity with the agreement. The plaintiffs were bound to show that there had been a common mistake on both sides, which was not even suggested in the bill.

Judgment.
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The VICE-CHANCELLOR:—

In this suit the plaintiffs have sought to be relieved against the legal effect of the covenants and obligations

(a) 6 Ves. 328, 335.

1862.
 SEATON
 v.
 STANILAND.
 ———
Judgment.

of a lease which was granted by an infant under the statutory jurisdiction of this Court. The bill prays that the lease may be rectified so as to exclude from the grant and demise a steam-engine and rails and other machinery, which, as the plaintiffs allege, were not the property of the infant lessor. It is also asked that the covenant as to the delivery up of possession may be altered in other particulars, and especially as to growing crops. It is needless to enter into a consideration of the difficulty of establishing in any case a right of relief against covenants beneficial to an infant lessor deliberately entered into by the lessee under the sanction of this Court, and exacted by the Court for the benefit of the infant. All the proceedings before the Court, and in the Master's office, which led to the preparation and execution of the lease in question, seem to have been careful and regular. The steam-engine and rails, which are said to have been improperly included in the demise, were used in working the lime quarry, which was the principal subject of the lease. It appears from the evidence that the engine and rails, if they were not such fixtures as belonged to the infant lessor, were the property of the lessees, and so entirely under their dominion that they were entitled to covenant to deliver them up to the lessor at the end of the term.

There is no evidence whatever to prove that there was any mistake on the part of the lessees as to including these articles in the demise and the covenants. If they were the property of the infant it is clear that they were properly included. If, on the other hand, they were the property of the lessees, being essential to the convenient working of the quarry, there was nothing unreasonable in their agreeing to include them in the demise, and agreeing to covenant to deliver them up to the lessor, with the quarry itself, at the end of the term.

It is truly alleged in the 57th paragraph of the bill, that the lease was ordered to be granted according to the

1862.
SEATON
v.
STANILAND.
—
Judgment.

Master's report and the conditional agreement of the plaintiff Preston Seaton and his co-lessee. The bill states that this conditional agreement was dated the 7th of July, 1846. By that agreement the plaintiffs were certainly bound. To entitle themselves to any part of the relief prayed by their bill they must prove that agreement. But it is not produced, nor is there any evidence of its contents to show that the lease as approved by the Master, and as executed, is not in every respect—as to the property comprised in it, as to the term of years created by it, and as to the covenants—in every particular entirely conformable to the agreement entered into by the lessees.

The attempt on behalf of the plaintiffs to show that, as to the growing crops and the custom of the country, there is a mistake in the lease, must fail for the same reason. There is no evidence whatever of any such violation of the custom of the country in any of the covenants as would justify the Court in relieving the plaintiffs from the obligation of the covenants for the benefit of the infant lessor, into which they deliberately entered under the order of the Court, and according to an agreement the terms of which they have not proved to be in any one particular inconsistent with the covenants of the lease.

It is not an unimportant circumstance that the plaintiff Preston Seaton was one of the guardians of the infant of whose property he obtained this lease, nor is it unimportant to observe that it is not until the plaintiffs have had the full benefit of the lease, and after it has expired, that they come forward and ask to have it rectified, so as to take away benefits to the infant lessor which by the lease it was deliberately covenanted that he should have. As the case of the plaintiffs has entirely failed the bill must be dismissed with costs.

1862.

Nov. 5, 12,
17, § 19.

LACON v. LIFFEN.

THIS bill was filed by the plaintiffs, bankers, of Great Yarmouth, against Thomas Brown Liffen, the mortgagor, and William Bell and John Rous, the assignees in bankruptcy, of Messrs. Peters & Peacock, fish merchants, of the same place.

The bill stated that on the 20th of December, 1858, there was a cash balance of 564*l.* 13*s.* 2*d.* due from Messrs. Peters & Peacock to the plaintiffs on a current account at their branch bank at Lowestoft, and, on the plaintiffs requiring a security for the same, Messrs. Peters & Peacock, on the 20th of December, 1858, deposited with the plaintiffs, by way of security for that sum, and any future demands, the three following securities:—

1. A security dated the 18th of December, 1858, whereby a ship or boat called *The Five G's* was mortgaged by the defendant Liffen to Messrs. Peters to secure the repayment of 60*l.* and interest on the 20th of August then next.

2. Another security of the same date whereby another boat called *The Six B's* was mortgaged by Liffen to the same parties to secure a like sum of 60*l.* and interest on the same date.

3. A mortgage security of the same date, whereby a third boat called *The Rapid* was mortgaged by one Samuel Capps to the same parties, to secure repayment of 35*l.* and interest from the same date. These mortgages were registered at the custom-house at Lowestoft on the 20th and 21st of December, 1858.

The bill alleged that on the 22d of December, 1858, two cheques amounting to 112*l.* 13*s.* 3*d.* drawn by

Where the registered mortgagees of three fishing boats deposited the mortgage deeds with their bankers as security for a debt, and afterwards became bankrupt—*Held*, that, the statutory form of assignment being by indorsement, the mortgages could not be dealt with by the bankrupts, and therefore were not in their order and disposition.

A bill of sale by a trader of all his stock-in-trade to secure an antecedent debt and all future advances is an act of bankruptcy.

1862.
LACON
v.
LIPPEN.
—
Statement.

Messrs. Peters were presented at the Lowestoft Bank, which the plaintiffs refused to honour except Messrs. Peters would give them, by way of further security, a bill of sale of the furniture, goods, and effects in Messrs. Peters & Peacock's dwelling-houses and fish offices at Lowestoft. To this Messrs. Peters & Peacock assented, and executed a bill of sale, whereby, after reciting that Messrs. Peters & Peacock were then indebted to the plaintiffs in the sum of 578*l.*, and had agreed to secure the repayment thereof, and also any further moneys in which they might thereafter become indebted to the plaintiffs in pursuance of the agreement, and in consideration of the premises, all the furniture, goods, and effects in Messrs. Peters & Peacock's dwelling-houses and fish offices at Lowestoft, their book and other debts, and all the personal estate whatsoever of or to which the said Messrs. Peters & Peacock were then, and at all times thereafter, so long as any moneys should remain due and payable to the plaintiffs, should be entitled, were assigned to the plaintiffs, with powers of attorney, &c.

On the 23d of December the plaintiffs paid the two cheques, and the balance due to them from Messrs. Peters & Peacock amounted on that day to 581*l.* 18*s.* 10*d.* Messrs. Peters & Peacock were the registered owners at the time of the bankruptcy.

The bill alleged that Messrs. Peters & Peacock had agreed to execute a legal transfer of the mortgage securities, but had not done so. It was alleged also in the evidence that on the 23rd of December Mr. Peters was willing to execute such transfers, but Mr. Peacock refused.

On the 28th and 29th of December the bill of sale was put in force by the plaintiffs, and realised the sum of 280*l.* 5*s.* 6*d.* On the 29th and 30th of December they gave to the mortgagors notice of their holding the securities.

On the 30th of December Messrs. Peters & Peacock were adjudged bankrupts. The plaintiffs proposed to

prove for a sum of 349*l.* 3*s.* 8*d.*, the alleged balance of their debt, but they were allowed to prove for a sum of 173*l.* 13*s.* 7*d.* only. On the margin of the deposition the following note was written with the concurrence, as was alleged, of Mr. Thomas Rouse Watson, the solicitor of the bankruptcy, and in the presence of Mr. Rouse, the trade assignee, and signed by Mr. Evans, the Commissioner:—"Proof allowed for 173*l.* 13*s.* 7*d.* the difference of 155*l.*, and 20*l.* 10*s.* being given credit for in respect of three mortgages on three boats named *The Five G's*, *The Six B's*, and *The Rapid*, held by Messrs. Lacon & Company, and for expenses of sale. J. Evans, Commissioner, 29th May, 1859."

1862.
LACON
v.
LIFFEN.
—
Statement.

The plaintiffs alleged that they applied to the Custom-house Commissioners at Lowestoft on the 8th of July, 1861, to have their names placed on the register as transferees of the mortgages of the three boats, but they were informed that, as the registered mortgagees had become bankrupt, and the transfer to the plaintiffs had not been executed prior to the act of bankruptcy, the plaintiffs' equitable title could not be recognised, as the mortgages could only be dealt with by the mortgagees.

The bill alleged that on the 7th of January last the plaintiffs learnt that the defendant Liffen had advertised for sale the boat called *The Six B's*, and also the wreck and materials of *The Five G's*, and this bill was originally filed for an injunction to restrain the sale. The injunction was granted, *ex parte*, in January.

On the 24th of April the assignees of Messrs. Peters & Peacock commenced an action against the plaintiffs. The declaration contained two counts, by the first of which the defendants claimed 1000*l.* damages for the execution under the bill of sale of the 22d December, 1858, and by the second damages for the detention of the mortgage securities.

The bill, as amended, prayed for an injunction to restrain the action, and for a declaration that the execu-

1862.
 LACON
 v.
 LIPPEN.
 ———
 Statement.

tion by Messrs. Peters & Peacock of the bill of sale of the 22d December, 1858, was not an act of bankruptcy; that the plaintiffs had a lien on the boats in respect of the equitable deposit of the securities with them; and that the assignees might be directed to join in proper transfers of the securities, so that the same might be duly registered, &c.

In June, 1862, the plaintiffs moved for and obtained an injunction to restrain the action.

The cause now came on for hearing.

Argument.
 ———

Mr. Malins and Mr. W. H. Bennett for the plaintiffs.

The plaintiffs became transferees by deposit of the mortgages of certain fishing boats. They held the deeds, and their title was therefore complete in this Court. It was said, however, that, inasmuch as the subject matter of the mortgages was ships, no court of law or equity could recognise any interest in ships that did not appear on the register in pursuance of the Merchant Shipping Act, 1854, section 37; and the case of *The Liverpool Borough Bank v. Turner* (a) would be cited in support of that view; but that case was decided before the passing of the Merchant Shipping Amendment Act, 25 & 26 Vic. c. 63, which provided, in section 3 (b), that equities

(a) 1 Joh. & Hem. 159.

(b) The 3d section is as follows :
 —“It is hereby declared that the expression “Beneficial interest” wherever used in the second part of the principal Act (1854) includes interests arising under contract, and other equitable interests, and the intention of the said Act is that, without prejudice to the provisions contained in the said Act for preventing notice of trusts from being entered in the register-book or received by the Registrar, and without prejudice to the

powers of disposition and of giving receipts conferred by the said Act on registered owners and mortgagees, and without prejudice to the provisions contained in the said Act relating to the exclusion of unqualified persons from the ownership of British ships, equities may be enforced against owners and mortgagees of ships in respect of their personal interest therein in the same manner as equities may be enforced against them in respect of any other property.”

might be enforced against the owners and mortgagees of ships (*a*).

It followed, then, that the plaintiffs' interest was one which this Court was bound to recognise; but it would be next contended that the property was within the order and disposition of the bankrupts. Now, what were the facts? The deeds were deposited with the plaintiffs by the bankrupts with an undertaking to execute a formal transfer, which they or one of them subsequently refused to execute, but the bankrupts could not have executed any transfer to any other than the plaintiffs, because the imperative form of transfer referred to by the Merchant Shipping Act, 1854, form K., was by indorsement (*b*). This brought the case within the late decision of *Morris v. Cannan* (not reported).

In this case the bankrupts had promised to execute a legal transfer, and on the faith of that promise had obtained an advance. It was submitted that under such circumstances the security was valid. In *Pye v. Daubuz* (*c*), where the facts were nearly the same, the assignees were ordered to pay the mortgage debt, or to convey the estate to the mortgagee. [*Jones v. Gibbons* (*d*) was also cited.] In *Ex parte Langston* (*e*) it was held that

1862.
LACON
v.
LIPPEN.
Argument.

(*a*) On the question of equitable mortgages of ships see *De Mattos v. Gibson*, 1 J. & H. 79; *European & Australian Royal Mail Company Limited v. Royal Mail Steam Company*, 4 K. & J. 676.

(*b*) 17 & 18 Vic. c. 104, s. 51. Every bill of sale for the transfer of any registered ship, or of any share therein, when duly executed shall be produced to the registrar of the port at which the ship is registered, together with the declaration hereinbefore required to be made by a transferee, and the Registrar shall thereupon

enter in the register-book the name of the transferee as owner of the ship or share comprised in such bill of sale, and shall indorse on the bill of sale the fact of such entry having been made, with the date and hour thereof, and all bills of sale on any ship or shares in a ship shall be entered in the register-book in the order of their production to the Registrar.

(*c*) 2 Dick. 759.

(*d*) 9 Ves. 407.

(*e*) 17 Ves. 227; s.c. 1 Rose, B. C. 26.

1802.

LACON

v.

LIFFEN.

Argument.

an equitable mortgage by deposit of deeds covered subsequent advances, upon evidence that they were made on that security. With regard to the bill of sale, it was contended that it was given to secure a present advance as well as an antecedent debt, and was not therefore invalid. In *Hutton v. Crutwell*(a) it was held that, in order to make the bill of sale an act of bankruptcy, it must have been executed to defeat the creditors, which was not in this case pretended: *Bittlestone v. Cooke* (b) and *Whitmore v. Claridge*(c).

[*De Hahn v. Hartley*(d) was also cited.]

On these grounds it was submitted that the plaintiffs' title could not be impeached, either to the proceeds of the bill of sale or to the ships comprised in the transfer of mortgage.

Mr. Bacon and Mr. G. L. Russell for the assignees.—The real question was whether the beneficial interest in these ships must not be taken to have been in the order and disposition of the bankrupt. Under the old law it was clear that the Court could only look at the register to find the owner. In *Follett v. Delany*(e), where the bill alleged that the defendant had fraudulently caused himself to be registered as the owner, it was held on demurrer that the Court could not interfere. The Merchant Shipping Amendment Act merely said that equitable interests were to be regarded by the Court, but it did not say that, upon bankruptcy, the beneficial interest was not ostensibly in the assignees of the bankrupt. There was no analogy between this case and that of *Morris v. Cannan*. In that case the ground of the decision was that any one by inquiring at the office might have ascertained that the shares had been sold; but here

(a) 1 Ell. & B. 15.

(d) 1 T. Rep. 343.

(b) 6 *Ibid.* 296.

(e) 2 De G. & Sm. 235.

(c) 31 L. J. N. S. 141.

the inspection of the register would have led to the opposite conclusion. It was clear that this property was in the order and disposition of the bankrupt, and passed to the assignees.

But, further, by the 3rd section of the Act of 1862 the power given to registered mortgagees by the 43rd and 66th sections of the Act of 1854 was reserved; and, if so, the bankrupts, although they had deposited their title deeds, had a power of disposition over the subject matter of the mortgage; which was, therefore, within their order and disposition.

On the second question, viz., as to the bill of sale, it was proved by the evidence that it was given to secure an antecedent debt as well as a present advance, and was therefore void. [*Graham v. Chapman* (i), *Ex parte Sparrow* (k), *Smith v. Cannan* (l), *Oriental Bank v. Coleman* (m), were also cited.]

Mr. *Malins* was heard in reply.

The VICE-CHANCELLOR:—

The first question in this case is as to the validity of the lien claimed by the plaintiffs in respect of the deposit of the two instruments of mortgage on certain ships. It appears that the bankrupts were the registered mortgagees of the ships in question, and that the deposit of the instruments of mortgage was made to secure the plaintiffs' debt before the act of bankruptcy. For the assignees it was argued that, according to the Merchant Shipping Act of 1854, as construed by this Court in the case of *The Liverpool Borough Bank v. Turner*, no equitable lien by deposit of the instrument of mortgage can be recognised as valid, and that registration is necessary to give any valid title.

(i) 12 C. B. 85.

(k) 2 De G. M. & G. 907.

VOL. IV.

(l) 2 Ell. & B. 35.

(m) 3 Giff. 11.

G

1862.

LACON
v.
LIFFEN.

Argument.

Judgment.

1862.
 LACON
 v.
 LIFFEN.
 —
Judgment.

In the present case no assignment of the mortgage was executed by the bankrupts to the plaintiffs or appeared on the register. It was therefore insisted that the bankrupts, as the registered mortgagees, had the mortgages in their order and disposition at the time of the act of bankruptcy.

The plaintiffs, however, referred to the Merchant Shipping Act of last session (1862) as expressly declaring that interests under contracts and other equitable interests must be recognised as included in the words "beneficial interest" in the Act of 1854. To this the assignees replied, that the qualifying words in the 3rd section of the Act of 1862 reserved the power of disposition to registered mortgagees given by the 43rd and 66th sections of the Act of 1854; and therefore that the bankrupts, as registered mortgagees, although they had deposited the instruments of mortgage, still had a power of disposition, and might have executed a valid assignment of the mortgages, notwithstanding the deposit.

But, on referring to the provisions of the Act of 1854 as to the disposition or transfer of mortgages, it appears that the statutory form of assignment can only be executed by indorsement on the instrument of mortgage. The words of the form of transfer in schedule K, referred to in the 73rd section of the Act of 1854, seem to be conclusive on this subject as they include the words "*the within-written security.*" So that, without the production of the original instrument of mortgage, no valid assignment or disposition could be made. The deposit of the original mortgage with the plaintiffs seems, therefore, to have taken from the bankrupts the power of making any effectual disposition or transfer of the mortgage, and thus that deposit constitutes the plaintiffs equitable mortgagees, who have a valid security in the ships.

So far, therefore, as the bill prays for a declaration that the plaintiffs have a lien on the proceeds of the ships,

they are entitled to a decree to that effect, together with the costs of the suit as to that part of the case.

But as to the second question, which involves the consideration of the validity of the bill of sale, the plaintiffs have failed. In the case of *Bittlestone v. Cooke*(a), it was held that where a bill of sale of all a trader's goods is in part for a byegone debt, it is an act of bankruptcy; and the Court referred to the cases of *Graham v. Chapman*(b) and *Smith v. Cannan*(c) as authorities on this point. It must, I think, be considered that the law is so settled. The case of *Hutton v. Crutwell*(d) was decided on the ground that the bill of sale was executed to secure a present advance of money made on the faith of that security; and not as to any part of it for an old debt, because the gross amount secured by the deed was advanced at the time by the creditor to whom the bill of sale was executed. In the present case the bill of sale is expressly given as a security for the whole debt, and also for future advances. It seems, therefore, to be within the decided cases. It is an act of bankruptcy in itself, and the bill must be dismissed with costs so far as relates to the bill of sale.

An attempt was made on the part of the plaintiffs to support the bill of sale on the ground that the assignees were bound to admit it by reason of a memorandum signed by the commissioner in the margin of the affidavit of proof of the plaintiff's debt. But no such point is raised by allegations in the bill, or by the prayer; and if it had been raised, neither the terms of the memorandum nor the evidence seem to establish with sufficient clearness that there was any agreement which bound the assignees to admit the validity of the bill of sale. Therefore, upon the whole, as to the equitable lien claimed by the plaintiffs on the proceeds of the ships, there must be a

1862.
 LACON
 v.
 LIPPEN.
 Judgment.

(a) 6 Ell. & B. 307.

(c) 2 Ell. & B. 35.

(b) 12 C. B. 85.

(d) 1 Ell. & B. 15.

1862.
 LACON
 v.
 LIFFEN.
 —
Judgment.

decree in favour of the plaintiffs with costs; and the bill, so far as it seeks relief in respect of the bill of sale, must be dismissed with costs.

The injunction restraining the defendants from impeaching at law the bill of sale was then dissolved, and the bill dismissed against the defendant Liffen without costs.

Nov. 8.

ALT v. ALT.

A suitor wrote to the mother of the young lady as follows:—"If your daughter has or may have money, my wish and intention would be that it should be settled for her sole and separate use."

Consent to the marriage having been given, in the faith that the intention thus expressed would be fulfilled, and the marriage having taken effect without a settlement, the Court ordered the wife's property to be settled in the usual way, and the costs of the suit and of the settlement to be paid out of the fund.

ON the 21st of February, 1862, the defendant addressed a letter to the mother of the plaintiff, then seventeen years of age, which contained the following passage:—" * * * I was so charmed, so led away, that I was obliged to confess this, and my confidant exerted her influence so effectually that I received another invitation from Mrs. Crockford, which I attended last night, and that has led to my writing this letter, and I know that until I receive an answer I shall be unfit for anything.

"I therefore, through yourself, offer my hand and heart to your daughter, promising that should there be any compact between us, an understanding, an engagement, or that most solemn of ties, an eventual marriage, that it will at all times be my endeavour to do all I can for her happiness."

After a statement of his connections and prospects the writer proceeded thus:—

"I can safely say that I have enough to maintain a wife upon.

"If your daughter has or may have money my wish

and intention would be that it should be settled for her sole and entire use."

A bill was filed by the wife, by her next friend, pray-
for a settlement; the 3rd, 4th, and 5th paragraphs of the
bill were as follows:—

1862.
—
ALT
v.
ALT.
—
Statement.

The plaintiff's mother agreed to the proposals contained
in the said letter, and, on the faith and in the belief that
a good and valid settlement would be made of all the
property to which the plaintiff was or might become
entitled as offered by the defendant in his said letter, she
consented to a marriage between the plaintiff and defen-
dant, but desired that such marriage should be postponed
until the plaintiff attained the age of eighteen years.

The defendant accordingly proposed to and was ac-
cepted by the plaintiff, and on the 15th day of August,
1862, although the plaintiff had not then attained the
age of eighteen years, the plaintiff and defendant were
married at St. Pancras Church, in the parish of St.
Pancras, in the county of Middlesex, by licence, without
the knowledge of the said Mary Ann Hannah Harbord,
and without any settlement of the plaintiff's property,
or any other settlement being made on such marriage.

Applications have been made on behalf of the plaintiff
by the said Mary Ann Hannah Harbord to the defendant
to make and execute a valid settlement of all the property
to which the plaintiff is or may become entitled pursuant
to the terms of his aforesaid letter, but the defendant
refuses or neglects so to do, and he alleges that the afore-
said letter is not a binding agreement on him to make
such settlement, and that, even if it be binding on him,
it is not sufficiently explicit in its terms to enable him
to make a settlement which, if executed after marriage,
would be binding and effectual.

The plaintiff submits that the defendant is bound by
the aforesaid letter and the acceptance by the plaintiff's
mother, the said Mary Ann Hannah Harbord, of the

1862.
 ALT
 v.
 ALT.
 —
Statement.

offers thereby made, and that a proper settlement ought now to be made under the direction of this Honourable Court of all the present and future property of the plaintiff in such manner and upon such trusts as is and are usual in settlements of the wife's property.

The bill alleged that the plaintiff was entitled to a sum of 5000*l.*, part of a sum of 8499*l.* 5*s.* 4*d.* Bank Annuities, and the residue of the sum of 8499*l.* 5*s.* 4*d.* subject to her mother's life, and to certain real property in Norfolk.

The bill prayed as follows:—

That it may be declared that the aforesaid letter of the defendant dated the 21st day of February, 1862, and the acceptance by the plaintiff's mother the said Mary Ann Hannah Harbord of the offers made therein by the defendant, constitute a binding agreement on the defendant to make a proper settlement of all the property to which the plaintiff is or may become entitled: And that the defendant may be decreed to make such settlement accordingly: And that a proper deed or deeds for that purpose may be settled and approved by this Honourable Court: And that the defendant may be decreed to execute the same.

Or else that it may be declared that the plaintiff is entitled in equity to have a proper settlement made upon her and her children of all the plaintiff's present and future property: And that the defendant may be decreed to make and execute such settlement thereof as this Honourable Court shall direct.

Argument.
 —

Mr. *Dickinson*, for the bill, submitted that the marriage took place on the faith of the promise expressed in the letter of the 21st February, and that in the eye of this Court such letter constituted an agreement, binding on the husband.

Mr. *Shebbeare*, for the husband, contended that there

was nothing in the letter to bind the husband; at the same time he was quite willing to submit to any order the Court might make.

1862.

ALT
r.
ALT.

Judgment.

The VICE-CHANCELLOR:—

It is clear that the marriage took place on the faith of the promise expressed in this letter to settle the whole of the young lady's property, present and future, for her separate use. The defendant is, therefore, as much bound in the eye of this Court as if he had executed a settlement containing such stipulations. There must be the usual reference to approve of a settlement having regard to the letter. The costs of the settlement and of the suit to be paid out of the fund.

Re SHUTTLEWORTH'S ESTATE ACT;
BLACKBURN RAILWAY AMALGAMA-
TION ACT; LANCASHIRE AND YORK-
SHIRE RAILWAY, AND THE LANDS
CLAUSES CONSOLIDATION ACT.

Nov. 8th.

By an Act of Parliament in the 3 & 4 Vict. c. 25, certain parts of the estates devised by the will of Robert Shuttleworth, Esq., deceased, were vested in certain trustees for sale, and for authorising grants in fee and building leases, and other purposes.

The 4th section of the Act enacted that all sums of money arising from sale should, until reinvestment,

be paid—*Held*, that under the 80th section of the latter Act the company were bound to pay the costs of the petition for interim investment.

Where land was taken by a railway company under the compulsory powers of their own Acts, with which the Lands Clauses Consolidation Act was incor-

1862.

Re SHUTTLE-
WORTH'S
ESTATE ACT,
BLACKBURN
RAILWAY,
&C., ACT,
LANCASHIRE
AND YORK-
SHIRE, AND
LANDS
CLAUSES
CONSOLIDA-
TION ACT.

—
Statement.

"from time to time be laid out in the purchase of Exchequer Bills;" it was further provided that it should be lawful for the Court of Chancery to make such order or orders that, whenever the Exchequer Bills should be in the course of payment by Government and new Exchequer Bills issued, such new bills might be received or exchanged, &c., all which Exchequer Bills, whether purchased or exchanged, should be deposited in the Bank of England in the name of the Accountant-General, to be placed to his account there "*Ex parte* the purchaser or purchasers of the estates of Robert Shuttleworth, deceased," until a proper purchase should be found; and until the same should, upon petition to the court by the person or persons entitled to the possession or the receipt of the rents and profits of the lands to be purchased, be ordered to be sold by the Accountant-General, for completing such purchase or purchases, in such manner as the Court should think just and direct.

The 14th section empowered the trustees from time to time, out of the moneys which should come to their hands, to reimburse themselves all costs, charges, damages and expenses; and the 15th section enacted that it should be lawful for the Court of Chancery from time to time to make such order as to the Court should seem fit, for taxing and settling all the costs, charges, and expenses which had been or might be incurred in preparing and obtaining the Act, and in making the several applications to the Court in pursuance thereof, and in making and completing the sale or respective sales of the hereditaments thereby made saleable, and the costs, charges, and expenses of taking the moneys out of the Bank and investing the same in new purchases as aforesaid, or otherwise in carrying the trusts and purposes of the Act into complete execution, and also for the payment of all such costs, charges, and expenses as aforesaid, out of any of the moneys arising under that Act, or by sale of Con-

sols therein mentioned, or out of the money arising by sale of the Exchequer Bills, so to be purchased as aforesaid, and that it should be lawful for the said Court of Chancery from time to time to make such further order or orders touching the said moneys or in relation to the premises as the same Court should think fit.

The Blackburn Railway Company and the Lancashire and Yorkshire Railway Company had each, under the powers contained in the Lands Clauses Act, taken part of the lands the subject of settlement; but it was found that the lands could be sold only under the powers of the Shuttleworth Estate Act. The purchase-moneys had been paid into the Bank to the credit of the above-mentioned account.

This petition was presented by the tenant for life, the trustees of his marriage settlement, and the trustees appointed under the private Act, praying that the purchase-moneys might be invested in the purchase of Exchequer bills under the provisions of the private Act. The petition also prayed that the costs of the application might be paid by the company.

Mr. *Kay* appeared for the petitioners, and asked that the companies might be ordered to pay the costs of the petition in pursuance of the 80th section of the Lands Clauses Consolidation Act.

Mr. *Pole*, on behalf of the company, contended that the purchase had been effected under the provisions of the private Act, which governed the whole of the proceedings both as to the sale and as to the investment. The case was clear, therefore, of the Lands Clauses Consolidation Act; and if so, the costs of the investment must be defrayed in the manner pointed out in the private Act.

The VICE-CHANCELLOR said, that the companies' right

1862.

Re SHUTTLE-
WORTH'S
ESTATE ACT,
BLACKBURN
RAILWAY,
&C., ACT,
LANCASHIRE
AND YORK-
SHIRE, AND
LANDS
CLAUSES
CONSOLIDA-
TION ACT.

Statement.

Argument.

Judgment.

1862.

Re SHUTTLE-
WORTH'S
ESTATE ACT,
BLACKBURN
RAILWAY,
&c., ACT,
LANCASHIRE
AND YORK-
SHIRE, AND
LANDS
CLAUSES
CONSOLIDA-
TION ACT.

Judgment.

to take the land depended on their own Acts of Parlia-
ment, of which the Lands Clauses Act formed a part.
It seemed, therefore, that the cost of the investment of
the money paid into court fell within the provisions of
the 80th section of the Lands Clauses Act, and must be
paid by the companies.

Re THE SETTLED ESTATES ACTS,

Nov. 15, 17.

1854 AND 1856.

Where a sub-
purchaser, at
an improved
price, applied
by summons
to be substi-
tuted in the
place of his
vendor (the
original pur-
chaser), who
resisted the
application,
the Court
refused to
make the
order, but, at
the suggestion
of the trustees,
ordered a
resale, on the
terms that the
original pur-
chaser pay the
improved
price into
court.

ON the 2nd September, 1862, Captain James A.
Legard, of West Cowes, R.N., obtained a summons
against Charles William Hoffmeister, that he might be
substituted as the purchaser of property at West Cowes,
in the Isle of Wight, in the place of Charles William
Hoffmeister, Esq., who was declared the best bidder for,
and the purchaser, of certain several lots of land at a sale
which took place under the direction of the Court on the
15th of August last.

At the sale Mr. Hoffmeister was declared the purchaser
of various lots for sums amounting in the whole to the
sum of 3095*l*. On the 25th August Captain Legard
entered into an agreement with Mr. Hoffmeister for the
purchase of his contract on payment of 500*l*. in addition
to the above-mentioned sum. The agreement, which was
in writing, was as follows :—

“ Captain Legard and my father have agreed that the
estate West Cliff (the whole purchased by my father at
the sale) should be assigned to Captain Legard, in con-

sideration of his paying the sum of 500*l.* on completion of the purchase. We are desirous that Captain Legard should, if possible, take his title direct from the Court of Chancery without Mr. Hoffmeister's name appearing; but if this cannot be carried out, then Captain Legard and Mr. Hoffmeister to bear the expense of an assignment from Mr. Hoffmeister to Captain Legard jointly.

1862.
Re THE
SETTLED
ESTATES ACTS
1854 & 1856.
Statement.

“ W. C. HOFFMEISTER (for C. W. Hoffmeister).

“ GEORGE PROTHERO (for Captain Legard, of Grove House).

“ Aug. 25, 1862.”

This sub-contract was entered into by Mr. Hoffmeister and Captain Legard in ignorance of the rule regulating sales under the order of this Court, that a sale of property under the Court does not become absolute till eight days after the chief clerk's certificate has been filed. [See *Dewell v. Tufnell.*] (a). Captain Legard subsequently, on consulting his solicitor, ascertained that the contract was an infringement of this rule, and that he could not safely pay the improved price to Mr. Hoffmeister.

Mr. Fortune, who was Mr. Hoffmeister's town solicitor, deposed that Mr. Williamson, Captain Legard's solicitor, at an interview mentioned the above arrangement to him, and asked him whether he would undertake to indemnify Captain Legard against the risk of having to pay the 500*l.* over again and into court. This the deponent, on the part of Mr. Hoffmeister, declined.

Mr. Clark, the auctioneer who sold the property, deposed, “ that at the sale the first bidding was made by Captain Legard for 1800*l.*, and that the succeeding biddings were chiefly by Mr. Hoffmeister and Captain Legard, and that the bidding previously to that at which

(a) 1 K. & T. 324.

1862.
Re THE
 SETTLED
 ESTATES ACTS
 1854 & 1856.
 Statement.

the lots were knocked down, namely, the sum of 2700*l.*, was made by Captain Legard. Before knocking down these lots, I gave Captain Legard ample time to bid further—more than the usual time—and repeatedly urged him to advance upon the bidding, pointing out to him that the property must be worth more to him than a stranger, and assuring him, over and over again, that the property was absolutely sold at the fall of my hammer; but he declined any further contest.”

On the 29th September Mr. Fortune wrote to Mr. Williamson, proposing a reference to determine whether Mr. Hoffmeister or Captain Legard should be the purchaser at the sum of 3595*l.*, and who should bear the costs, including those of the vendor. He said, “The question is to be treated not as one of law or practice, as to which there can be no doubt, but solely as one between gentlemen who wish to act towards each other fairly and honourably.” Messrs. Williamson replied on the 4th October that they must advise their client to decline the proposition. That the matter was to be considered as one not of law, was entirely out of the question. It was the rule of law in these cases, and nothing else, that prevented Captain Legard from carrying out the agreement with Mr. Hoffmeister in the way intended by both parties. That the agreement in question, according to the authorities, was an agreement which enured for the benefit of the estate, and the judge was the fittest person to determine that point. If the vendors were content with the price named, there was nothing to determine.

To this Messrs. Smith and Fortune replied, on the 4th of October, “It is admitted that the purchase-money must be 3595*l.*, and therefore there is no question of law on which the Vice-Chancellor, or any one else, need be troubled. We have no doubt both the vendors and the chief clerk will be satisfied.” In reply Messrs. William-

son wrote on the 8th, "We must adhere to the course mentioned in our former letter, and take the Vice-Chancellor's opinion on the whole case."

Upon the occasion of settling the draft certificate of sale, on the 22nd August, in which Mr. Hoffmeister was certified as purchaser for 3095*l.*, Mr. Williamson, being present, expressed to Mr. Fortune Captain Legard's intention of applying to open the biddings at an advance of 300*l.* Mr. Fortune said he was thereupon instructed by Mr. Hoffmeister to offer, in that event, an increase to the amount of 350*l.*

Captain Legard was in possession of one of the houses forming part of the property sold, under a tenancy for three years commencing in the autumn of 1860. He deposed that, being under a firm conviction that he was also to have, at the end of the term, a right of pre-emption from the trustees, under his agreement, he suffered himself to be outbid at the sale, before the biddings had reached the price he intended to give.

Mr. Hoffmeister, by his counsel at the bar, expressed his willingness to pay the improved price into court for the benefit of the estate.

Mr. *Bacon* and Mr. *Robson* for the motion.—The rule of this Court is that where, before the purchase made under the sanction of this Court is confirmed, the purchaser makes a subsale, the purchaser from him stands in the place of his immediate vendor. In *Hodder v. Ruffin* (*a*), the purchaser having resold with a profit, the Court ordered the substituted purchaser to pay the additional purchase-money into court. The substituted purchaser was subject to the liabilities, and was therefore entitled to all the rights which the original purchaser had under the contract. This was so well settled that, according to the ordinary practice, a purchaser under the Court

(*a*) Tam. 341.

1862.

Re THE
 SETTLED
 ESTATES ACTS
 1854 & 1856.

Statement.

Argument.

1862.
 Re THE
 SETTLED
 ESTATES ACTS
 1854 & 1856.
 ———
 Argument.

was not discharged, even on payment of the money, without an affidavit that there was no under-bargain, *Rigby v. M'Namara (a)*. But further, where on a resale the property does not produce the improved price, the Court will hold the sub-purchaser responsible for that amount: *Holroyd v. Wyatt (b)*. [Daniel's Chancery Practice, 1208; and Sug. V. & P. 13th ed. 78, were also cited. See also *Morice v. Bishop of Durham (c)*.]

Mr. *Malins* and Mr. *Casson* for the original purchaser.— Whatever the Court might do to prevent any loss to the estate, it was quite clear that where the original purchaser was willing (as here) to pay the improved price, this Court would not deprive him of his rights under the contract. Mr. Hoffmeister had not been guilty of any improper conduct; in ignorance of the rule that he could not make a binding contract before his purchase was confirmed, he had agreed to sell, but that was no reason for this Court depriving him of his rights under the purchase. There was no case which laid down any such principle as that the mere subsale ousted the original purchaser. It was submitted therefore, that the motion must be refused with costs.

Mr. *Craig* and Mr. *J. N. Higgins* for the vendors, the trustees, asked for a resale.

Judgment. The VICE-CHANCELLOR:—

No authority has been cited, and I believe none can be found, to show that a sub-purchaser is entitled, against the will of the original purchaser, and without the consent of the vendors, to stand in the place of the original purchaser.

The Court, without consent, has no jurisdiction over any contract that may have been entered into between

(a) 6 Ves. 515.

(b) 2 Coll. 327.

(c) 11 Ves. 57.

Mr. Hoffmeister and Captain Legard, nor can it interfere with any remedy which Captain Legard may have against Mr. Hoffmeister.

When the Court interferes on these occasions, it is generally on the application of the vendor, and invariably with the consent of the purchaser.

The Court has one plain duty to discharge, which is, that the estate should be sold for the best price that can be secured consistently with justice to all parties concerned. It appears that 3095*l.* has been already secured, but, in consequence of this dispute, both of the competitors are willing to advance on that sum 500*l.* In this state of things Mr. Hoffmeister, the original purchaser, insists on retaining the estate at that increased price. All that the vendors ask is that the estate may be again put up for sale. The result is that no order can be made on Captain Legard's application except that the vendors' costs must be paid, as between solicitor and client, out of the fund. There must be a resale upon terms, and in order to secure the highest price it must be on the terms that 500*l.* be paid into court by Mr. Hoffmeister in addition to his former bidding.

1862.
Re THE
 SETTLED
 ESTATES ACTS
 1854 & 1856.
Judgment.

1862.

Nov. 17, 18.

PATCH v. WARD.

Demurrer to a bill for redemption after a foreclosure decree, which the bill asked to open only as to one of the four parties to the decree, allowed with costs, and leave to amend refused.

THIS was a demurrer. The bill alleged that from the year 1843 to 1848 the plaintiff was a builder, carrying on business at Notting Hill and Paddington, and the defendant acted as his solicitor during that period.

The plaintiff, in the beginning of the year 1843, had obtained various leases, and agreements for leases of building land, and he in that year applied to the defendant to procure him advances of money, which he required for erecting and completing the houses and buildings thereon; and the defendant undertook and agreed to advance or procure clients of his own to advance the various sums of money which the plaintiff required, and it was arranged by the defendant that the sums required were to be advanced from time to time by instalments, as the erection of the houses and buildings proceeded. The total sums expressed to be advanced were from time to time secured by mortgages upon the different houses for specific sums of money, but the amounts expressed to be secured by such mortgages were not in fact advanced at the date of such mortgages, but were made up by sums advanced from time to time as aforesaid, and of sums which were deducted and retained by the defendant as and for the amount of interest upon the said mortgage debts, and of gross sums for costs and commissions which the defendant claimed to be due to him in respect of the various mortgage transactions in which the plaintiff was mortgagor.

The aggregate sums agreed to be raised on the mortgage were about 20,000*l*.

Throughout the whole of the said transactions the defendant was employed as and acted as sole solicitor and

sole legal adviser of the plaintiff, and transacted and charged the plaintiff for all legal business done in connection with the said mortgages, as well as large sums for commissions. The plaintiff had full confidence in the defendant, and, having his whole time occupied by attention to his own business, and in the erections of the various houses aforesaid, the plaintiff was compelled to leave, and in fact left, all matters of business relating to the said several mortgaged premises entirely in the hands of the defendant as his confidential solicitor. The plaintiff had great confidence in the defendant, and the plaintiff from time to time acquiesced in and assented to everything suggested by the defendant, and acted under his advice in all transactions and matters of business, and the plaintiff from time to time executed and signed such mortgages, charges, accounts, and other documents as were placed before him by the defendant for his signature and execution, and, without examining or perusing the same, or without the same being perused or investigated on his behalf by any other person than the defendant.

The mortgage transactions in which the plaintiff and defendant were engaged upon the terms and in manner aforesaid were numerous, and, from the manner in which the monies agreed to be advanced by the defendant on behalf of himself or his clients were advanced and paid to the plaintiff, and from the manner in which the accounts of sums advanced, interest on advances, commissions, and costs were mixed up together by the defendant, it became extremely difficult and ultimately almost impracticable for the plaintiff to ascertain his exact position or his liabilities, except as the result of careful investigation, with full information supplied by the defendant; and the plaintiff had in fact no opportunity of testing the correctness of the defendant's accounts and claims, or of ascertaining whether the sums agreed to be advanced on each mortgage security had been in fact duly and properly

1862.
 PATCH
 v.
 WARD.
 ———
Statement.

1862.
PATCH
 v.
 WARD.
 —
Statement.

advanced to him, or otherwise duly applied or appropriated by the defendant.

The bill, after stating several mortgages, alleged that by an indenture of mortgage dated the 4th of November, 1844, between the plaintiff and the defendant, in consideration of the sum of 3000*l.* therein expressed to be lent by Henry Ward to the plaintiff, and of such further sums as Ward should actually lend to the plaintiff not exceeding 5500*l.*, the plaintiff granted and demised certain land and eleven messuages thereon, and all the premises comprised in a lease dated the 4th of November, 1844, for the then residue of the term of ninety-three years and a quarter, wanting three days, subject to redemption on payment of 3000*l.*

That by an indenture dated the 3rd of May, 1845, indorsed on the deed of the 4th of November, 1844, between Ward of the first part, plaintiff of the second part, one C. G. Parsons of the third part, and Leaf and Baily of the fourth part, reciting that 5500*l.* was due, and should be paid off out of monies belonging to Leaf, Ward, and Baily, and that the debt and securities should be transferred to them, the same were then transferred to G. C. Parsons, in trust for Leaf, Ward, and Baily, and by an indenture, also indorsed on the mortgage deed, and dated the 5th of May, 1845, the debt of 5500*l.* was assigned to Parsons in trust for Leaf, Ward, and Baily, That by an indenture dated the 10th of September, 1845, between the plaintiff of the first part, and Vulliamy of the second part, the plaintiff demised the same hereditaments, and the eleven messuages thereon, to Vulliamy, and his executors, for the residue of the term, less nine days (subject to the mortgage debt for 5500*l.*) to secure 1000*l.*

In the latter part of the year 1846, and the beginning of the year 1847, the plaintiff was engaged in erecting six houses situate in Bishop's Road, Paddington, upon build-

1862.
 PATCH
 v.
 WARD.
 ———
 Statement.

ing ground of which the plaintiff had obtained long leases, and the houses erecting thereon were of a very large and valuable description, and the plaintiff was desirous of obtaining an advance of the sum of 7200*l.* upon the security thereof, and he applied to the defendant, who, as the plaintiff's solicitor, and on the plaintiff's behalf, negotiated with the Law Fire Insurance Company for an advance of the sum of 7200*l.* upon the security of the said houses, which the said company agreed to make. At this time, on account of the then state of the money market, the plaintiff had found some difficulty in immediately raising the funds required for carrying on very extensive building operations in which he was engaged, and as the defendant was well aware the plaintiff was in such a situation, and that it was imperatively necessary for him to carry out the said mortgage transactions immediately at any sacrifice.

The defendant, as hereinbefore stated, held all the plaintiff's title deeds, leases, papers, and documents, as well those comprised in mortgage securities as others, and before the completion of the said mortgage for the sum of 7200*l.* the defendant set up a claim for bills of costs and commissions, relative to various transactions in which he had acted as the solicitor of the plaintiff and his mortgagees, including the defendant's own costs as mortgagee, which bills of costs and commissions amounted, as the defendant insisted, to the sum of 3000*l.* or thereabouts. The said bills of costs were of a most unreasonable amount, and contained no proper or detailed charges, but consisted of several large gross sums of a most extravagant amount; and the said bills of costs contained, in addition to the charges for general business done, and all the full costs for and in respect of the preparation and execution of all the mortgage deeds and securities executed by the plaintiff, charges of gross sums for attendances in negotiating the loan, amounting together to the

1862.
PATCH
v.
WARD.

Statement.

sum of 650*l.*, and also sums amounting to the sum of 230*l.* and upwards, charged as and by way of commissions in addition to the plaintiff's bill of costs in respect of the same mortgage securities.

The plaintiff was desirous that the defendant's accounts, and the bill of costs claimed by him, should be gone into and properly investigated, but the defendant objected to this, and, after some discussion, he refused to proceed with the mortgage to the Law Fire Insurance Company, or to concur in the completion thereof, although the said company were prepared with the money they were ready to advance; it had been agreed that 4300*l.*, part thereof, was to be advanced immediately upon the execution of the mortgage, and the plaintiff had made his arrangements upon the footing of the said mortgage being forthwith completed; and the plaintiff, believing, as the fact was, that the defendant held securities by way of mortgage and otherwise, for all that was properly due to him, including all bills of costs, took possession of the six leases of the said houses in Bishop's Road, in order to carry out the mortgage through Messrs. Harrison & Beale, the solicitors of the Law Fire Insurance Company, the intended mortgagees, and requested them to proceed with the mortgage, which they agreed to do, and the plaintiff wrote to the defendant stating what he had done; and the plaintiff and defendant subsequently met at the office of the said Messrs. Harrison & Beale, and the plaintiff then offered to allow the whole of the money agreed to be advanced by the said insurance company to remain in the hands of Mr. Harrison, and to authorize him to pay therewith the amount found due to the defendant; the defendant, however, refused this, and insisted that he had a lien on the said leases; and the defendant, in the beginning of March, 1847, filed a bill in this Honourable Court against the plaintiff, claiming a lien upon the said leases, and praying an account of certain moneys, which

he claimed to be due to him upon the accounts between him and the plaintiff, and in respect of his said bill of costs amounting to the before mentioned sums, and praying payment of what should be found due, and other relief in respect thereof, and also praying an injunction to restrain the plaintiff from parting with the said leases; and the defendant obtained an *ex parte* injunction in the said suit.

The defendant was well aware, and it is the fact, that the plaintiff, from the necessity he was under of completing his buildings and works, was compelled at once to carry out the said mortgage, and obtain the sum of 7200*l.* at any sacrifice to supply his pressing necessities, and the defendant was well aware, as the fact was, that by reason of the lien and claim insisted on by him the plaintiff was unable to do so, and that the result of resisting the claims and costs insisted on by the defendant would, under the circumstances, have been inevitable ruin to the plaintiff; and the defendant availed himself of this pressure to dictate his own terms to the plaintiff. The plaintiff upon being served with the said *ex parte* injunction consulted Mr. Randall, who thenceforth acted for him in the said suit, but found that the only mode of investigating the defendant's accounts was by protracted litigation, and the plaintiff was in consequence obliged to submit to the defendant's terms.

The defendant thereupon delivered an account consisting of a great many sheets purporting to be accounts of all the various transactions between the plaintiff and the defendant. Such accounts are very complicated and involved, and included gross sums for costs, without any details, and would have taken a very long time to analyse and investigate. The defendant sent the documents on some day of March, 1847, by a clerk to the said Mr. Randall late in the evening of the day before the decree hereinafter mentioned, and it was impossible for him to

1862.
PATCH
v.
WARD.
—
Statement.

1862.
PATCH
v.
WARD.
Statement.

investigate the same, and the defendant required the plaintiff at once to submit to a decree in the said suit upon the terms contained in a memorandum which the defendant required the plaintiff to sign, and the plaintiff accordingly on the 25th day of March, 1847, without any investigation of the said accounts, signed the said memorandum at the foot of the said accounts. The said memorandum was prepared by the defendant and was signed by the plaintiff on the same day the accounts were delivered. The said memorandum was intitled in the said suit by the said defendant against the plaintiff, and was as follows:—

“ We hereby admit and acknowledge that the foregoing accounts contained in seventeen double sheets of paper are the accounts referred to by the pleadings and the minutes of decree agreed to be taken in this cause; that the same have been examined by the said defendant, with Mr. Randall, his solicitor; and the several bills of costs therein referred to have been inspected and explained to him by the said Mr. Randall; that the several sums charged in such accounts as commission represent a total amount of charges which the defendant hereby agrees to allow to the plaintiff for business transacted in his character of solicitor for the said defendant, for which charges, as well as those set out in the defendant's answer, no detailed bills, by express arrangement between the plaintiff and the defendant, have been delivered; but such charges, having been investigated and reduced by the said Mr. Randall, are, together with the costs of this suit, declared to be fair and reasonable charges; and it is admitted and declared that the various amounts entered on the credit side of such accounts as having been advanced to the said defendant Charles Patch on mortgage securities were duly paid to and received by the said defendant on the respective days in the said several securities men-

tioned; that the sum of 4300*l.* as shown in the preceding account is the balance remaining due to the plaintiff after having allowed to the defendant the sum of 254*l.* 6*s.* 9*d.*, and for which sum of 4300*l.* the decree in this cause is proposed to be taken. Dated this 25th day of March, 1847."

1862.
PATCH
v.
WARD.
Statement.

The said Mr. Randall acted on the plaintiff's behalf in the matter, but he had no opportunity of investigating the accounts and costs and claims of the plaintiff, and did not in fact investigate or examine the same, in consequence of the defendant refusing to allow a proper opportunity of doing so; and pursuant to the said memorandum a decree was on the same day of March, 1847, taken in the said suit for the sum of 4300*l.*, the amount mentioned therein. The said sum of 254*l.* 6*s.* 9*d.* was a sum named by the defendant to the said Mr. Randall as the sum he would deduct from the total claims: it was not the result of any investigation of the said accounts by the plaintiff or the said Mr. Randall.

The mortgage transaction of the Law Life Assurance Office was thereupon carried out, and out of the sum of 4300*l.* advanced upon such mortgage the sum of 2300*l.*, part thereof, was received by the defendant, who required, and the plaintiff executed, the mortgage security next hereinafter stated for the balance of 2000*l.*

By an indenture dated the 1st day of April, 1847, and made between the plaintiff Charles Patch of the one part and the defendant Henry Ward of the other part, after reciting, amongst other things, the lease and other indentures hereinbefore stated, and the said suit, in consideration of the said sum of 2000*l.*, part of the said balance of 4300*l.*, the plaintiff covenanted with the defendant Henry Ward to pay the sum of 2000*l.* and interest at the rate of 5*l.* per cent. per annum on the

day of then next, and the plaintiff granted and

1802.

PATCH

v.

WARD.

Statement.

demised, amongst other hereditaments, the said piece of ground with the eleven several messuages or tenements erected thereon, and all other the said premises demised by the said hereinbefore stated lease unto the defendant Henry Ward, his executors, administrators, and assigns, for all the residue of the term of years except the last day thereof, subject to the said mortgages of the 4th day of November, 1844, and the 10th day of September, 1845, and the said principal sums of 5500*l.* and 1000*l.* and interest, and subject also to redemption on payment of the said principal and interest moneys at the day mentioned in the said covenant for payment thereof; and in the now stating indenture is contained a power of sale in case of default.

Notwithstanding the said arrangement and submission on the part of the plaintiff to the terms imposed by the defendant, the defendant forthwith commenced a series of oppressive proceedings, in order, as the plaintiff charges, to embarrass and ruin the plaintiff, and thereby to enable the defendant to become the absolute owner of the said eleven messuages and premises comprised in the said mortgage securities hereinbefore stated, by foreclosing the said mortgage, as the plaintiff now alleges has been done under the circumstances and in manner hereinafter stated.

On the 5th May, 1847, half a year's interest on the mortgage debt of 5500*l.* became due, and the defendant shortly afterwards called on the plaintiff to pay the principal, though no interest but half a year's was due, or any arrears on any of the mortgages, but the defendant refused to accept the interest, alleging the plaintiff had broken the covenants in the deeds.

In March and May, 1847, the defendant, on behalf of himself and other mortgagees (except Vulliamy) instituted suits in this court against the plaintiff to foreclose certain mortgages, including those for 1200*l.* and 700*l.* The plaintiff succeeded in paying off the two latter mortgages.

On the 22d of May, 1847, the defendant, in the name of himself, Leaf, and Baily, filed a bill against the defendant (originally alone) to foreclose the mortgage of the 4th of November, 1844, for 5500*l*. Vulliamy was afterwards added as a defendant by amendment. The plaintiff was very anxious to avoid foreclosure, and raised 2000*l*., with which he paid off a mortgage of 1st April, 1847, for 2000*l*., believing if this sum were paid the defendant would forbear to foreclose.

The plaintiff, in consequence of the commercial crisis which then existed, found some difficulty in raising the amount required; but before he could do so, at the end of the month of September, the defendant, who acted throughout for Lewis Vulliamy, the second mortgagee, in the name of the said Vulliamy caused notices to be served on the tenants occupying the eleven houses in Queen's Road comprised in the mortgage security, forbidding them to pay rent to the plaintiff, and requiring them to pay the rents to one W. H. Stemp, who was the defendant's clerk, as agent for Vulliamy. The said Stemp, as agent for Vulliamy, from September or October, 1847, received the rents and profits until after the 16th March, 1849, when the final decree for foreclosure was made.

The only interest due to Vulliamy at the date of the notices on the 21st September, 1847, was half a year's interest, which accrued on the 10th September, 1847, amounting to 25*l*., less property tax. The rents which accrued due on the 29th September, 1847 (eight days afterwards), amounted to 165*l*., more than enough to pay all the interest due to Vulliamy, and also to Leaf the defendant, and Bailey, amounting altogether to 133*l* 9*s*. 6*d*., or thereabouts.

The plaintiff charges the several steps and proceedings aforesaid were respectively taken by the defendant without the privity, knowledge, or concurrence of the other mort-

1862.
PATCH
v.
WARD.
—
Statement.

1862.

PATCH

v.

WARD.

Statement.

gagees, his clients, for whom he purported to act, and who left all matters relating thereto to the defendant, who in fact acted as and was in all practical purposes the sole mortgagee of the said hereditaments and premises, and the object of the defendant throughout the several transactions was to deprive the plaintiff of all his available resources, and to render it impossible for the plaintiff to resist the foreclosure decrec sought by the said suit instituted by Ward, and to enable the defendant to procure absolute surrender of the said mortgaged property.

The defendant, by the means and proceedings aforesaid, accomplished his object of effectually embarrassing the plaintiff, and of depriving him of all resources, and the plaintiff found himself entirely at the mercy of the defendant, who was pressing on the said suit and proceedings in the name of himself and the other mortgagees, and the plaintiff, in consequence, in the month of May or June, 1848, with his wife and children, sailed from Southampton for America, without any means or resources whatever, and continued to reside there until the year 1860, when, having during that time succeeded in saving a sufficient sum to enable him to return and pay the debts due to his creditors, he in the month of August, 1860, returned to this country for that purpose, and at once took steps to pay off and redeem the several mortgages held by different persons upon his property, including the said before-mentioned mortgages upon the the said eleven houses in Queen's Terrace, Queen's Road, being ready and willing to redeem the same, and the plaintiff employed a Mr. Woodard to act on his behalf, who applied to the defendant for information upon the subject, and offered to redeem the mortgaged property, and pay all that was due upon the said mortgage securities. The defendant, however, alleged and he still alleges that in the said suit a decree for foreclosure had been obtained, and he claimed to be absolutely entitled to the

said mortgaged premises, and he refused to give the plaintiff any information with respect thereto; this was the first time the plaintiff became aware that the said suit had been proceeded with as against him, or that it was alleged by the defendant that a decree for foreclosure had been obtained in the said suit. The said Mr. Randall had appeared for the plaintiff in the said suit before the plaintiff was compelled to leave England for America, but, in consequence of plaintiff's difficulties, the said Mr. Randall ceased to act as the plaintiff's solicitor before the plaintiff left England, and had communicated that fact to the defendant, and took no steps on behalf of the plaintiff in the said suit.

The plaintiff, in consequence of the allegations of the defendant, made inquiries, and then, for the first time, discovered that Vulliamy had been made a defendant by amendment, and that the defendant had acted as his solicitor; that the suit had been heard on the 11th May, 1848, and a decree taken, in the plaintiff's absence, for an account; that it had been referred to the Master to take an account, and that the usual foreclosure decree had been made.

Pursuant, as the defendant alleged, to the decree, the Master made his report, dated the 16th June, 1848, which found that the whole of the principal sum of 5500*l.*, with interest at 5*l.* per annum, from the 14th May, 1847, was due to the plaintiffs (in that suit) over their securities, and there was due to the plaintiff up to the 1st December, 1848, the sum of 5003*l.* 17*s.*, which he appointed Lewis Vulliamy to pay to the plaintiff on the 1st December, 1848.

The defendant alleged that the Master's report was confirmed on the 3rd July, 1848, and that the sum of 5003*l.* 17*s.* was paid by Vulliamy on the 6th December, 1848, as provided for by the decree.

The plaintiff charges the said mortgage was not really

1862.
PATCH
v.
WARD.
Statement.

1802.
 PATCH
 v.
 WARD.
 —
Statement.

paid off, or, if the said sum of 5003*l.* 17*s.*, or any part of it, was paid off, it was paid by the defendant out of his own monies, and that the said Vulliamy paid no part of it and took no part in the suit, and was ultimately paid his principal and interest by the defendant.

In further pursuance of the decree, as the plaintiff alleged, the Master made subsequent reports upon affidavits made by Stemp and Parsons, both clerks of the defendant, whereby he found that 5003*l.* 17*s.* had been paid, and that, after giving credit for the rents of the mortgaged premises, received by Stemp and paid to Vulliamy, there remained a balance of 692*l.* 0*s.* 2*d.* due to the defendant on the 10th December, 1848; that he had computed interest thereon from the 10th September, 1848, to the 15th March, 1849, being three months after his report, and also interest on the sum of 5003*l.* 17*s.* from the 10th September, 1848, to the 15th March, 1849; and that there would be due to Vulliamy for principal, interest, and costs, with what he paid to the plaintiffs' for principal, interest, and costs, on the said 15th March, 1849, the sum of 6870*l.* 9*s.*, which he appointed the plaintiff to pay to Vulliamy on the 13th March, 1849, between 12 and 1 o'clock in the afternoon in the Rolls Chapel.

That it appeared by a copy of the account verified by Stemp's affidavit, dated the 10th December, 1848, that the total amount given credit for as having been received from the beginning of October, 1847, up to the 18th November, 1848, including the quarterly rents due in respect of each of the eleven houses on the 29th September, 1847, and on the 29th September, 1848, was 716*l.* 6*s.* 9*d.*; and that the said account, after payment of interest and commission and bills of costs, to one James, a solicitor usually employed, whose name was usually used by the defendant on matters where he did not wish to appear personally, was 318*l.* 3*s.*, which sum

was given credit for by Vulliamy as received in reduction of the principal sum of 1000*l.* secured by his mortgage security, leaving a balance of 692*l.* 2*s.*, found due in respect of the principal sum. Stemp further deposed that in October, 1847, he had been appointed by the plaintiff in this suit, with the consent of Vulliamy, to receive the rents of the said eleven houses comprised in the mortgage of the 10th September, 1848; that after paying ground-rent, insurance, and other outgoings he had, under a notice from Vulliamy, paid the rents to him. H. Stemp also verified the account.

The plaintiff charges, as the facts are, that the said Lewis Vulliamy employed the defendant as his solicitor, and that no such notice as mentioned in the said affidavit was ever given by the said Lewis Vulliamy, and that the clerk, the said William Henry Stemp, was the agent of the defendant and of the said Lewis Vulliamy, and not of the plaintiff, and that he acted throughout as such agent only, and in fact received the whole of the rents of the said mortgaged messuages and premises as from the 24th day of June, 1847, to the 15th day of March, 1849; and that previously to the 1st day of December, 1848, the said Lewis Vulliamy, by the said William Henry Stemp as his agent, had actually received various sums of money not mentioned in the said account so verified by affidavit as aforesaid, which ought to have been brought into the said accounts and credited accordingly, but which were in fact improperly excluded from the said account, in order to increase as far as possible the balance to be found due by the Master to the said Lewis Vulliamy under the said decree. The plaintiff does not believe or charge that the said Lewis Vulliamy was in any way cognizant of the irregularities complained of in this suit, and the plaintiff charges that the said Lewis Vulliamy, in fact, took no part whatever therein, and was in fact not cognizant thereof, but left all matters relating to the said mortgaged

1862.

PATCH

v.

WARD.

Statement.

1862.
PATCH
v.
WARD.
—
Statement.

premises, and the proceedings in the said suit, to the defendant, who used the name of the said Lewis Vulliamy in the several transactions in the Bill mentioned, for his own purposes and to effect his own object of acquiring the absolute ownership of the said mortgaged premises.

The statements of Stemp that he was appointed by the plaintiff, with consent of Vulliamy, to collect and receive rents, and that after deducting ground-rents, &c., he paid the balance to Vulliamy, were untrue. Previously to October, 1847, Vulliamy had entered as mortgagee in possession, and Vulliamy or the defendant appointed Stemp as agent to receive the rents for Vulliamy, for whose sole benefit he received them, while the defendant, not acting for the plaintiff, was actively prosecuting the decree for foreclosure.

The defendant alleges that on the 16th of May, 1849, an order absolute for foreclosure was obtained, but the plaintiff charged that, if so, it was irregularly obtained, and was not binding on the plaintiff,

It appeared from Stemp's affidavit that he attended at the place fixed by the Master, on the 15th of March, 1849, for the payment of the amount found due, but that it was not paid, and the sum of 6870*l.* 9*s.* now remains due.

The plaintiff recently discovered, between the date of the Master's subsequent report and the time fixed by the Master, that Stemp, as Vulliamy's agent, received from the tenants various sums on account of Vulliamy, so that on the day fixed for payment Stemp's affidavit was untrue, that the sum of 6870*l.* 9*s.* remained due.

The plaintiff stated some instances in which the whole amount received (prior to the time fixed for payment) had not been given credit for.

The plaintiff charges that the several other tenants of the said mortgage premises respectively paid the quarter's rents due on the 25th day of December, 1848, at some

time or times after that date, and before the 15th day of March, 1849, the time appointed by the Master's subsequent report for payment of the amount due, and that all the several payments aforesaid were well known to the defendant Henry Ward, and that he in fact ultimately received from the said William Henry Stemp the several sums and rents so received, and that any step taken in the said suit was taken by and under the direction of the defendant, or with his privity, and in particular the defendant was well aware of and directed all the proceedings taken by the said William Henry Stemp, his clerk, and was privy to the said account being filed and verified by the said William Henry Stemp in the said suit, and that the defendant well knew the same was incorrect. And the plaintiff charges that the truth of the several facts and matters hereinbefore stated and alleged will appear if he will truly answer, as the plaintiff charges he ought to answer, the interrogatories to this bill, and in particular if the defendant will answer and set forth, as the plaintiff charges he can and ought to set forth, the particulars of all sums of money on account or in respect of the said mortgaged premises, or any part thereof (other than and except the sums mentioned in the said account so filed in the said suit), which were received by the said William Henry Stemp and the defendant, and each of them or either of them, or by any person or persons, by their or either of their order, or for their or either of their use, did, when, and at what times respectively, and from and by whom by name respectively, and in respect of what house or houses, or otherwise, all and every the sums and sum so received were or was respectively received or paid.

The plaintiff has ascertained, and it is the fact, that the said Lewis Vulliamy never in any way interfered in the said suit or proceedings, or paid any sum of money to the first mortgagees in the said suit; but the defendant, after

1862.

PATCH

v.

WARD.

Statement.

1862.
 PATCH
 v.
 WARD.
 Statement.

the said foreclosure decree had been obtained, paid to the said Lewis Vulliamy all principal and interest moneys due to him, and obtained some conveyance or assignment from him, and the defendant Henry Ward in fact claims to be now the absolute owner of all the said mortgaged premises. The plaintiff charges, and it is the fact, that under and by virtue of certain assignments or assurances executed to him by the said Edwin Leaf, and Joseph Baily, and Lewis Vulliamy, the defendant has, since the subsequent report of the Master in the said suit and the alleged final decree of foreclosure, been and is now in possession or receipt of the rents and profits of the said premises comprised in the said mortgaged premises, as the absolute owner thereof, and that he in fact, by his clerk, the said William Henry Stemp, or otherwise, has received and applied for his own use all the rents and profits of the said hereditaments which have become due since the date of the Master's report of the 21st day of December, 1848, including all the rents which became due on the 25th day of December, 1848, and which were received by said William Henry Stemp previously to the said 15th day of March, 1849, as well as all the rents which have since accrued due.

The plaintiff charges that the said principal sums of 5500*l.* and 1000*l.* respectively, and the interest due thereon, either belonged originally to and were respectively the proper moneys of the defendant, or that the same have respectively been paid by the defendant Henry Ward, and that neither of them the said Edwin Leaf, Joseph Baily, and Lewis Vulliamy now has any interest in the said mortgaged premises, and they are not necessary parties to this suit. The said Edwin Leaf, Joseph Baily, and Lewis Vulliamy, left all matters relating thereto to the absolute discretion of the said Henry Ward, and that they respectively acted at the instigation or under the advice of the said defendant, and that the said

defendant in fact took the several steps and proceedings aforesaid, and availed himself of his position as mortgagee and solicitor to the mortgagees, and of the knowledge of the position and circumstances of the plaintiff, and of the value of said mortgaged premises acquired by the defendant whilst acting and by acting as the plaintiff's solicitor, for the purpose of enabling him thereby to become absolute owner of the said mortgaged premises.

1862.
PATCH
v.
WARD.
Statement.

Under the circumstances hereinbefore stated the plaintiff charges, as the facts are, that the said alleged foreclosure decree so obtained by the said Henry Ward in the name of the said Lewis Vulliamy as aforesaid, was obtained by the defendant for his own benefit by improper and collusive proceedings, and by pressure upon the plaintiff, and that the proceedings in the said suit were illusory, and that the said suit was not in fact instituted for the purpose of realizing the securities of any or either of the said mortgagees, or for their benefit, or under the direction or with the privity or concurrence of any or either of the mortgagees other than the defendant, and that under the circumstances hereinbefore stated the said foreclosure decree is not binding and conclusive upon the plaintiff by reason of the improper and fraudulent conduct and breach of duty of the defendant Henry Ward, and that the said foreclosure decree ought to be opened, and that the plaintiff ought as against the defendant, who now claims to be absolutely entitled thereto, and is the only person now interested therein (except the plaintiff), to be allowed to redeem the said mortgaged premises upon payment of all principal and interest moneys secured by the said hereinbefore-stated mortgages of the 4th day of November, 1844, and the 5th day of May, 1845, and also the said second mortgage of the 10th day of September, 1848, and of all such costs as are properly due or payable in respect of the said mortgaged securities, or otherwise; and that an account ought to be taken

1862.
PATCH
v.
WARD.
—
Statement.

of the interest due upon the said principal sums since the 15th day of March, 1849, and the same ought to be added to the amount found due in the said former suit up to that date, and that an account ought to be taken of the rents and profits of the said messuages and premises received by or come to the hands of the defendant or his clerk, the said William Henry Stemp, or any person or persons, by the order or for the use of the defendant or the said Lewis Vulliamy, not already given credit for in the said former suit, and that the amount which shall be so found due in respect of such receipts ought to be deducted from the whole amount which shall be so found due for principal, interest, and costs upon the said mortgage securities; and that upon payment of the balance which shall be found due upon the said securities after the said deductions, which payment the plaintiff offers to make, the defendant ought to be decreed to re-assign the said mortgaged premises to the plaintiff free from all incumbrances made, created, or occasioned since the death of the said mortgagees, and, if necessary, the defendant ought to be declared to be a trustee of the said premises, subject only to the said principal and interest moneys and costs so due as aforesaid.

The bill prayed that it might be declared—

1. That the plaintiff was entitled, as against the defendant, to redeem the said mortgages of 5500*l.* and 1000*l.*, on payment of principal, interest, and costs, and that subject thereto the defendant was a trustee for the plaintiff.

2. That interest, or subsequent interest, might be computed on the principal sums remaining due on the mortgage securities, as from the 15th day of March, 1849, and might be added to what was found due up to that date; and that an account might be taken of the rents and profits come to the hands of the defendant or Vulliamy, as from the 15th March, 1849, and not accounted

for in Stemp's account; and that it might be declared that the defendant was chargeable therewith, and that the same might be deducted from the principal monies, interest, and costs found due on the said mortgage securities, and that on payment of the balance (if any) due to the defendant the defendant might be decreed to assign and assure to the plaintiff the mortgaged premises free from incumbrances.

1862.
PATCH
v.
WARD.
—
Statement.

Mr. Giffard and Mr. Bevir, for ground of demurrer, submitted that the bill asked to open the foreclosure decree as to one only of the parties to such decree.

Argument.
—

His Honour then called on the plaintiff's counsel to support the bill.

Mr. Malins and Mr. Everitt for the plaintiff.—It was contended that the bill was demurrable on the ground that the plaintiff had not brought the other parties to the decree before the Court; but the demurrer admitted the truth of the allegations in the bill, and those allegations were, that the defendant to this bill was the real actor who had used the names of the other mortgagees for his own purposes. It was submitted, therefore, that the demurrer must be overruled.

But, if this were the hearing, and the allegations in the bill were proved, the plaintiff would be entitled to a decree on the present frame of the record. The defence was, in substance, a former decree of this Court defeating the plaintiff's right; "but on a suggestion of gross fraud not denied, as here, the Court will, upon an original bill, overrule a plea of decree and report confirmed:" *Lloyd v. Mansell* (a). In that case the bill alleged that a foreclosure decree had been obtained by fraud, to which the defendant pleaded a foreclosure decree and report, both made absolute, signed, and enrolled; but the Lord Chancellor

(a) 2 P. Wms. 73.

1862.

PATCH

v.

WARD.

Argument.

said "all these circumstances of fraud ought to be answered, which the defendant has not done," and directed the plea to be overruled, and not to stand for an answer.

In *Harvey v. Tebbutt (a)*, where a mortgagee resisted the right to redeem, on the ground of a foreclosure decree collusively obtained, the Court opened the decree, and decreed the mortgagee to pay so much of the costs of the suit as was occasioned by such resistance.

In this case there was this further ingredient, that the defendant was the plaintiff's solicitor. In *Bulkley v. Wilford (b)*, where an attorney, the solicitor and relative of the testator, advised him to levy a fine, and afterwards claimed as his heir-at-law (his will being revoked by the operation of the fine); he was held a trustee of the estate for the devisees, on the ground that no professional man can be allowed to take advantage of his own wrong.

In *Gore v. Stackpool (c)*, where the bill prayed that the plaintiff might be decreed entitled to redemption and re-conveyance of the mortgaged estates, notwithstanding the decrees and proceedings that had been taken, and also to all proper accounts, Lord Redesdale decreed all the proceedings in the foreclosure decree void.

In *Archbold v. The Commissioners of Charitable Donations (d)* the bill alleged fraud, which was not proved, but the plaintiff was held entitled to relief on other grounds.

[*Bowen v. Evans (e)*, *Burgh v. Langton (f)*, *Gurney v. Jackson (g)*, *Hiern v. Mill (h)* were also cited.]

Judgment.

The VICE-CHANCELLOR:—

In this case the plaintiff, seeking to open a foreclosure decree, admits the validity of the decree as to three of the

(a) 1 Jac. & W. 197.

(b) 2 Cl. & Fin. 181, 102.

(c) 1 Dow. 18.

(d) 2 H. of L. C. 440.

(e) 2 H. of L. C. 257.

(f) 5 B. P. C. 213, 215.

(g) 1 S. & G. 97.

(h) 13 Ves. 114.

parties in the foreclosure suit, and endeavours to re-open it only as regards the fourth. The decree for foreclosure cannot be opened without impeaching the whole decree. The plaintiff, moreover, is willing to recognise acts under the decree, such as the alleged assignments by the present defendant to the other mortgagees, but seeks nevertheless to set the decree aside, on the ground of irregularity and fraud. The relief granted by the Court, under the general prayer, must be consistent with the other relief prayed by the bill, and a redemption suit cannot be turned into one for other purposes. The demurrer must be allowed with costs, and without leave to amend.

1862.
PATCH
v.
WAND.
Judgment.



PRATT v. BULL.

Nov. 18.

THIS was a demurrer. The bill alleged that Thomas Bull executed a certain paper writing purporting to be his will, dated the 7th August, 1860, by which he made certain dispositions of his property :—

Shortly after the death of the said Thomas Bull the elder, the said defendant, as the alleged executor thereof, propounded the said paper writing, or alleged will, in her Majesty's Court of Probate; but John Bull, as the eldest son and heir-at-law of the said Thomas Bull the elder, and as one of his next of kin, lodged a caveat against the probate of the said will on the ground that the said Thomas Bull the elder was, at the time of the alleged date and execution of his said alleged will, of unsound mind, and was incapable of making a valid will; and in consequence of such caveat the said defendant instituted

An order of the Probate Court for the payment of money is not a charge on land within the meaning of the 1 & 2 Vic. c. 110.

1862.

PRATT

v.

BULL.

Statement.

a suit in the said Court of Probate to try the validity of the said alleged will, and to which suit the said John Bull, as such heir-at-law and one of such next of kin of the said Thomas Bull the elder deceased, and also Mary Anne Bull, the daughter and another of the next of kin of the said Thomas Bull the elder deceased, were made defendants, and the said suit came on for trial on the 5th day of February, 1861, before Sir Cresswell Cresswell, judge of the said Court of Probate; and pending such trial the said suit and the proceedings therein were compromised, and an order was thereupon made by the said learned judge whereby it was ordered by the Court, with the consent of the parties, their counsel and attornies, that a verdict should be entered for the plaintiff in the said suit (meaning the said defendant hereto) on all the issues, and with the like consent it was ordered that the same plaintiff should pay to the said Mary Anne Bull, one of the defendants in the said suit, and who was one of the next of kin of the said Thomas Bull the elder, as aforesaid, an annuity, or yearly sum of 25*l.* for and during the term of her natural life, and that the said order might be made a rule of the said Court at the instance of either of the parties, if the said Court should see fit.

Shortly after the said suit in the said Court of Probate was so compromised, and the said order therein was so made as aforesaid, the said defendant proved the said will of the said Thomas Bull the elder in Her Majesty's said Court of Probate, and he the said defendant thereupon became and now is the sole legal personal representative of the said Thomas Bull the elder deceased.

On the 8th day of May, 1861, the said Mary Anne Bull, through Mr. Walter Hamilton Davis, of No. 10, Golden Square, Regent Street, in the county of Middlesex aforesaid, as her solicitor, caused a memorandum or minute of the said order of the said Court of Probate to be left with the senior Master of the Court of "Common

Pleas" at Westminster, who forthwith entered the same in the proper book kept for that purpose, in pursuance of the statute of the 1st and 2nd Victoria, chapter 110, and such memorandum or minute contained the name of the said defendant as the person whose estate was intended to be affected by the said order; and the Cottage, New Hampton, Middlesex, was mentioned as the usual or last known place of abode of the said defendant; and the description of "gentleman farmer," as the title, trade, or profession of the said defendant; and the said Court of Probate and the title of the said suit therein was mentioned as the court and title of the cause in which such order had been made; and the 5th day of February, 1861, was mentioned as the date of such order, and the account of damages thereby ordered to be paid was therein mentioned to be 25*l.* per annum.

The hereinbefore mentioned order of the said Court of Probate was on the 24th day of July, 1861, upon application on behalf of the said Mary Anne Bull, ordered by the said Judge of Her Majesty's Court of Probate to be made, and was accordingly made a rule of the said Court.

A memorandum or minute of the said rule of the said Court of Probate, containing all the particulars contained in the said memorandum or minute of the hereinbefore mentioned order, was on the 19th day of October, 1861, left by the said Mary Anne Bull, through the said Mr. Walter Hamilton Davis, as her solicitor, with the said senior Master of the said Court of Common Pleas at Westminster, who forthwith entered the particulars thereof of the said rule as set forth in the said last mentioned memorandum, in the proper book kept for that purpose, in pursuance of the said statute of the 1st and 2nd Victoria, cap. 110, sec. 19, and the registration of the said memorandum or minute of the said rule is still subsisting and in full force.

A memorandum of the said annuity or yearly sum of

1862.
PRATT
v.
BULL.
—
Statement.

1862.

PRATT

v.

BULL.

Statement.

25*l.* was also on the said 19th day October, 1861, duly registered in pursuance of the statute of the 18th Victoria, chapter 15, as against the estate of the said defendant, and such last mentioned registration is still subsisting and in full force; the said Mary Anne Bull, to whom the said annuity or yearly sum of 25*l.* is secured and made payable during her life as aforesaid, being still living.

By an indenture dated the 16th November, 1861, Mary Anne Bull assigned the annuity to the plaintiffs, with power to receive and give receipts for the same.

At the time of his death the testator was entitled to certain leasehold hereditaments at St. John's Wood, and other parts of London, one of which was subject to a mortgage.

The defendant, on obtaining probate of the testator's will, entered into possession of the said leasehold premises.

The hereinbefore mentioned order and rule of the said Court of Probate so respectively registered in the said Court of Common Pleas as aforesaid, have under and by virtue of the said statute of the 1st and 2nd Victoria, chapter 110, the same effect as a judgment in one of the superior Courts of Common Law at Westminster; and such registration as aforesaid constitutes the said annuity or yearly sum of 25*l.* for the life of the said Mary Anne Bull, a valid charge upon all the freehold and leasehold hereditaments and premises of the said defendant, including all the said several leasehold premises which were the property of the said Thomas Bull the elder deceased at the time of his death as aforesaid; and the said plaintiff is under and by virtue of the aforesaid registrations, and the hereinbefore stated indenture of the 16th day of November, 1861, entitled to such charge and to the same remedies in this Honourable Court as against the said several leasehold premises in the same manner and to the same extent as he, the said plaintiff,

would have been in case the said defendant had, as he in fact had, power to charge the same several leasehold premises, and had by writing under his hand agreed to charge the same several leasehold premises, with the amount of the said annuity or yearly sum of 25*l.* during the life of the said Mary Anne Bull; and under the circumstances aforesaid the said plaintiff is advised, and hereby charges, that according to the true construction of the 13th section of the said statute of the 1st and 2nd Victoria, chapter 110, the said plaintiff has now a right to enforce, and to proceed in this Honourable Court to obtain the benefit of, such charge as aforesaid; the said rule of the said Court of Probate having been obtained more than one year prior to the filing of this bill of complaint, that is to say, on the 24th day of July, 1861; and the obtaining of such rule, and the subsequent registration thereof as aforesaid, being tantamount to having entered up a judgment against the said defendant on the said 24th day of July, 1861; and having subsequently registered such judgment in the said Court of Common Pleas.

The bill alleged that under the circumstances the plaintiff had become entitled to have the annuity paid out of the rents and profits of the leasehold premises.

The bill alleged that the defendant, as executor and sole beneficial legatee of the testator's will, and with a view of defeating the order and rule of the Court of Probate, had put up the property for sale by auction, but had bought it in. The bill asked for an injunction to restrain the sale, and prayed for a declaration—

1. That the annuity was a charge on all the said leasehold premises to which the testator was entitled at the time of his death, as against the defendant and all persons claiming through or in trust for him, and on the equity of redemption of those in mortgage.

2. That the arrears and future payments of the said

1862.
 PRATT
 v.
 BULL.
 —
Statement.

1862.
 PRATT
 v.
 BULL.
 —
Statement.

annuity of 25*l.* during the life of the said Mary Anne Bull, might be paid out of the rents and profits of the said leaseholds, or out of the dividends and interest to accrue duly on the proceeds of the sales of the said leaseholds.

3. That, in case the leaseholds should be sold, a sufficient part of the proceeds to answer the annuity should be laid out and invested, with liberty to apply.

The bill further prayed for an injunction to restrain the defendant from completing the sale, or encumbering the premises, without paying into Court a sufficient sum to answer the annuity, and also from receiving the rents and profits of the leasehold premises. The bill also asked for a receiver, and all necessary accounts.

Argument.
 —

Mr. *Bacon* and Mr. *Hardy* for the demurrer.—The object of this bill is to obtain a declaration of the Court that an order of the Court of Probate for the payment of an annuity operates as a charge on the leasehold estates. The question turns mainly on the construction of the 25th section of the 20 & 21 Vic. c. 77, s. 25. By that section it is enacted that the Court of Probate shall have the like powers for enforcing its orders as are vested in the Court of Chancery. It is to be observed that the Legislature does not say that the order of the Court of Probate shall have the same effect as the orders of the Court of Chancery, but simply that there shall be the same authority for enforcing its decrees. Now, it is not under its power to enforce its decrees that a decree of this Court charges the land, but by virtue of a distinct provision in the 1 & 2 Vic. c. 110, ss. 13 and 18, which enact that a judgment entered up in any of her Majesty's Superior Courts at Westminster, shall operate as a charge on all lands, and that decrees and rules of the Courts of equity and law should be considered judgments. But can this enactment apply to decrees of the Court of

Probate? Clearly not, as it was not called into existence till nineteen years afterwards. If, indeed, the 1 & 2 Vic. c. 110, had anywhere declared that the decrees of the Ecclesiastical Courts then in existence should operate to charge real estate, there might be some colour for the claim set up by this bill, inasmuch as the Court of Probate may be said to represent the Ecclesiastical Court, but the absence of any such provision clearly shows that it was not the intention of the Legislature to invest the decrees of the Probate Court with the same power to bind real estate as the Superior Courts of law and equity. It is certain that in terms the Legislature has not done so. This distinction is quite reasonable. It does not come regularly within the scope of the jurisdiction of the Court of Probate to direct payment of any sum of money. In this particular case a proceeding in the Court was compromised, and the compromise was made a rule of court. If the plaintiff has any remedy under this order, it is in the Court that made it: *The Thames Iron Works Company v. Patent Derrick Company* (a). Secondly, if the order is not under the statute a charge on land, it is quite clear that the Registration could not make it so. (b).

Thirdly, the bill does not allege that the annuity was in arrear.

Mr. Malins and Mr. Bilton for the bill.—The 25th sec.

(a) 1 Joh. & Hem., 93, 101.

(b) 20 & 21 Vic. c. 77, s. 25.—

“The Court of Probate shall have the like powers, jurisdiction, and authority for enforcing the attendance of persons required by it as aforesaid, and for punishing persons failing, neglecting, or refusing to appear, or to be sworn, or make affirmation or declaration, or to give evidence, or guilty

of contempt, and generally for enforcing all orders, decrees, and judgments made or given by the Court under this Act, and otherwise in relation to the matters to be enquired into and done by or under the orders of the Court, as are by law vested in the High Court of Chancery for such purposes in relation to any suit or matter depending in such Court.

1862.
PRATT
v.
BULL.
Argument.

1862.

PRATT

v.

BULL.

Argument.

of the 20 & 21 Vic. c. 77, gave the Court of Probate the same powers for enforcing its orders as the other Superior Courts had at that time. What were those powers? One of them, and perhaps the most valuable, was a power to make a decree which fastened on the land. Then, why was that power to be excepted? It was not the question whether the 1 & 2 Vic. c. 110 gave to the Probate Court the power in question, but whether, having, as it was admitted it did, conferred that power on the Superior Courts, the Act of 1857, which enacted that the Probate Court should have all the powers which the other Superior Courts then had, did not include this, the most important one.

It was submitted, therefore, that the demurrer ought to be overruled with costs.

Mr. *Bacon* was heard in reply.

Judgment.

The VICE-CHANCELLOR:—

If an order of the Court of Probate is to have the force and effect of a judgment of a Court of law, or a decree or order of this Court, it must have that force and effect, either by express words in the Act of Parliament which constituted the Court, or by necessary implication from the language of that Act and of the Act of 1 & 2 Vic. c. 110, construed with reference to each other.

Inasmuch as the Court of Probate was not in existence at the time when the 1 & 2 Vic. c. 110 was passed, it is not likely that there can be found in that Act words to support the case made by the bill. The words of that Act are confined to judgments of the Superior Courts of common law at Westminster, and orders and decrees of the High Court of Chancery.

The Act of the 20 & 21 Vic. c. 77, which constituted the Court of Probate, might have declared, and probably would have expressly declared if the Legislature had

so intended, that all orders, judgments, and decrees of that Court should have the same force and effect as judgments of the Superior Courts of common law at Westminster, and orders and decrees of the High Court of Chancery. There are, however, no such express words to be found in the 20 & 21 Vic. c. 77. But in the 25th section there are very remarkable words, which say, that "the Court of Probate shall have like powers, jurisdiction, and authority *for enforcing* all orders, decrees, and judgments made or given by the Court under that Act, and otherwise in relation to the matters to be inquired into and done by or under the orders of the Court under that Act, as are by law vested in the High Court of Chancery for such purposes in relation to any suit or matter depending in such Court." That section, in plain language, gives to the Court of Probate only authority to enforce its own orders. It may enforce its own orders in the same manner as the orders of this Court can be enforced, by writs of execution, or in such other lawful manner as will not be inconsistent with the practice of this Court. But the power of enforcing an order is one thing, and the force and effect of an order are another; and if I am asked to construe these clauses which relate to the power of enforcing the orders of the Probate Court as meaning that its orders shall have the same force and effect as judgments of a Superior Court of law, and decrees and orders of this Court, there seems to be no language or authority to enable me to do so. On the contrary, there are two circumstances which seem to restrain this Court from putting any such large construction upon the words, "the power of enforcing all orders, decrees, and judgments, made or given by the Court of Probate." The Legislature, in constituting the Court of Probate, constituted it as a Court for a peculiar and extraordinary jurisdiction, which was theretofore exercised, not by a Court of the Queen, but by the Ecclesiastical

1862.
 PRATT
 v.
 BULL.
 Judgment.

1862.
 PRATT
 v.
 BULL.
 —
Judgment.

Courts, which were constituted for the purpose of deciding all questions relating to the validity of wills, and for granting probates and letters of administration. These matters are now made the prominent objects of the jurisdiction of the Court of Probate. There is no jurisdiction over matters of debt given by this Act of Parliament, though it is very true that there is nothing to restrain the Court from making orders for the payment of costs, or sums of money agreed to be paid in cases of compromise; and no doubt such orders would be within the jurisdiction of the Court.

But, considering the character of the Court—its great scope, and the object of its jurisdiction—a judgment in the sense of a peremptory order of the Court against a debtor at the instance of a creditor would be foreign to the jurisdiction of the Court of Probate.

This is explained by the Act of Parliament; for, on looking at the 83rd section, (a) I find that the Court of Probate has a jurisdiction to exact a bond of security from those who are intrusted as executors and administrators, with power to collect and administer the assets of deceased persons, the amount of which is fixed by the Court; and this is done to create an obligation as between a debtor and a creditor. The jurisdiction of the Court of Probate is to exact such a bond, but the Act directs that bonds so exacted shall not be the subject of litigation in the Court of Probate, but shall be enforced in a Court

(a) 83rd section. "The Court may, on application made on motion or petition in a summary way, and on being satisfied that the condition of any such bond (prescribed by the 81st section) has been broken, order one of the registrars of the Court to assign the same to some person to be named in such order, and such person, his executors or adminis-

trators, shall thereupon be entitled to sue on the said bond in his own name, both at law and in equity, as if the same had been originally given to him instead of to the judge of the Court, and shall be entitled to receive, as trustee for all persons interested, the full amount recoverable in respect of any breach of the condition of the said bond.

of common law, or in a Court of equity. All this seems to show that a judgment, which in a general sense is an order of a Court to be enforced by a creditor against a debtor, is not the sort of order which is within the proper scope and province of the jurisdiction of the Court of Probate.

1869.
PRATT
v.
BULL.
—
Judgment.

For these reasons I think there is no ground for construing the language of the Act, so as to say that the words of the 25th section give to the orders of the Probate Court the same force and effect as judgments of a court of law, or the decrees of the Court of Chancery. I am, therefore, of opinion that this demurrer must be allowed, and with costs.



SCAMMELL v. LIGHT.

Nov. 19, 20.

THIS was a demurrer. The bill prayed—

1. That the estate of a person named James Light might be administered in this Court, and proper accounts directed, &c. &c.

2. That for the purposes aforesaid proper accounts might be taken of the dealings and transactions of the defendants respectively in respect of the testator's estate and property between the 11th September, 1848 (the date of his lunacy) and his death, and of the monies received by the defendants in respect of such dealings and transactions, and of the application thereof, and that the

Bill to administer the estate of a deceased person found lunatic by commission, and for an account of the dealings of the defendants with his estate from the date of the lunacy till his death, alleging fraud.
Demurrer by the defend-

ants, who were the executors and trustees of a will made before the lunacy, and also committee and surety under the commission, that the proper jurisdiction was in lunacy—
Overruled with costs.

1862.
SCANNELL
v.
LIGHT.
—
Statement.

balances due from the defendants respectively to the testator's estate might be ascertained, and that the defendants might be charged in account with such balances, and with interest thereon after such rate and during such periods as to this Court should seem just.

The bill alleged that in and prior to 1848, up to the issuing of the commission, James Sign, the testator, was engaged in partnership with the defendant John Light, and was entitled to considerable balances due from the said John Light. He also carried on business on his own account, and was entitled to a considerable amount due on book debts. He was also entitled to certain real estate. In September, 1848, the testator became of unsound mind, whereupon the defendant John Light took on him to act as trustee on behalf of the testator, and received and dealt with the property in concert with the defendant, Thomas Tate. On the 11th September, 1848, the defendant Light caused the lunatic to be removed to a lunatic asylum. The bill alleged that the defendant Light had received considerable sums of money belonging to the lunatic in December, 1848. The defendant Light presented a petition, praying for a commission in lunacy. A commission was accordingly issued, and on the 20th January, 1849, Sign was found lunatic. At the date of the commission the defendant Light knew that the lunatic had made his will, prepared by Mr. Brown, the solicitor to the commission, and that the defendants had been appointed executors and trustees thereof. After the commission it was agreed between the defendants that the defendant Light should procure the defendant Tate to be appointed committee of the person and the estate of the lunatic, and that Light should become one of the sureties. The bill then proceeded to allege a series of fraudulent and improper proceedings, committed by the committee and John Light, acting in concert together, such as concealing and understating the value of

1862.
 SCAMMELL
 v.
 LIGHT.
 Statement.

the testator's share in the business. That the defendant Light was allowed to receive the amount, under an arrangement between him and the committee, which was concealed from the Lord Chancellor. That the sale of the lunatic's property was also managed by Light under the said agreement. That the said Light retained large sums in his hands, let for hire the vessels in which the lunatic had shares, and sold some of them. That no part of the monies was invested, or paid into Court, but the same were retained by John Light in his own hands, and mixed with his own moneys, and employed in his own trade, and remained in the possession of the defendant Light at the death of the lunatic. That, in order to conceal the mode in which the estate had been dealt with, the defendants agreed that the committee, Thomas Tate, should not pass his accounts, which he never did, except for the first year, and in that account none of certain capital sums were mentioned. The bill stated sums to the amount of 381*l.* 2*s.* 1*d.*, as being received in the lifetime of the lunatic. The bill further alleged the defendant Tate, with the priority of Light, let certain real estate belonging to the lunatic, but never accounted for the rents; that the defendants alleged that they had accounted for such rents, but no account had ever been delivered to the plaintiff or to any other person. The bill alleged that James Sign, before the lunacy, made his will, dated the 10th August, 1848, of which he appointed the defendants executors and trustees, and whereby he made certain dispositions, under which the plaintiffs had ultimately acquired an interest. The testator died on the 8th May, 1856. The bill then proceeded thus:—

At the funeral of the said James Sign the defendant John Light gave orders, and acted and conducted himself as one of the executors and trustees of the said will, and on that occasion the plaintiff Henry Harrison asked the defendant John Light whether the said James Sign had

1862.
SCAMMELL
v.
LIGHT.
Statement.

died rich, to which the defendant John Light replied that there would be plenty for all if it was not fooled away in law, and upon the said last named plaintiff asking what had become of the money arising from the sales of the said James Sign's property, the defendant John Light replied that it was in the Bank of England, and as safe as the bank.

The statement so made by the defendant John Light as to the investment of the said money was wholly false. In fact no part of the money arising from the sales of the said testator's property has ever been invested, but the greater part thereof remained, and was at the death of the said James Sign, and still is, in the hands of the said John Light, and the residue thereof was and the same still is in the hands of the defendant Thomas Tate.

The defendants, acting fraudulently and in collusion together, resolved that the moneys in the hands of the defendant John Light, as aforesaid, should be retained by him for the common benefit of them the said defendants, and that, in order to avoid the necessity of the defendant John Light accounting for the same, which they were aware he would be compelled to do if he proved the said will, the same will and codicil should be proved by the defendant Thomas Tate alone, who is a person of little or no property, and that the defendant Thomas Tate should not call upon or require the defendant John Light to pay over any part of the moneys in his hands on account of the said testator's estate.

Accordingly on the 12th July, 1858, and not before, the defendant Thomas Tate alone, in pursuance of the said arrangement, proved the said will and codicil, and the defendant John Light, although he had previously represented himself to be and acted as the executor and trustee of the said testator, renounced probate of the said will and codicil. On that occasion the value of the said testator's estate was stated to be not exceeding the sum of 200*l.*, and duty was paid thereon accordingly.

In pursuance of the said fraudulent arrangement, the defendant Thomas Tate, acting in collusion with the defendant John Light, has refused and still refuses to take any proceedings against the said last-named defendant to compel the payment of the amount in his hands on account of the said testator's estate, or to procure an account of the moneys received by him the said defendant John Light, in respect of such estate.

1862.
SCANNELL
vs.
LIGHT.
—
Statement.

As the plaintiffs are advised, the defendant John Light, notwithstanding his renunciation as aforesaid, has accepted the office of trustee and executor conferred upon him by the said will, and is liable to account for the said testator's estate as such executor and trustee, and cannot now disclaim the trusts of the said will.

No account of the said testator's estate, or of the application thereof, has ever been furnished by the defendants, or either of them, to the plaintiffs, or any of them, and the defendants have refused, and still refuse, to furnish any such account.

Very large balances or sums of money arising from the said testator's estate are now in the hands of the defendants, but they refuse to pay the same, or any part thereof.

No proper account of the said testator's estate can be taken without ascertaining the manner in which the said testator's estate was dealt with and disposed of by the defendants respectively between the date of his lunacy and his death; and the defendants have never stated, and they refuse to state, any such account, and the same cannot be taken without the assistance of this Honourable Court.

Some proper person ought to be appointed to receive and collect the testator's estate.

The defendant Tate filed a demurrer and answer. The demurrer was as follows:—

To so much of the bill of complaint as prays that

1862.
 SCAMMELL
 v.
 LIGHT.
 —
Statement.

accounts may be taken of the dealings and transactions of this defendant in respect of the estate and property of the testator James Sign in the said bill mentioned between the 11th day of September (the date of the lunacy of the said testator) and his death, and of the moneys received by this defendant in respect of such dealings and transactions, and of the application thereof, and as prays for relief consequent upon the taking of such accounts, and as seeks for discovery for the purposes of taking such accounts and consequent relief, this defendant doth demur, and for cause of demurrer sheweth that this Honourable Court has no jurisdiction, and that the proper jurisdiction is with the Lord Chancellor, entrusted with the care and commitment of the custody of the persons and estates of persons found idiot, lunatic, or of unsound mind; and for further cause of demurrer sheweth that the plaintiffs are not entitled in this Honourable Court to any relief against or discovery from this defendant, and this defendant humbly prays the judgment of this Honourable Court as to such parts of the said bill as he has so demurred to as aforesaid. And as to the residue of the said bill of complaint this defendant in answer, &c., &c.

Argument.
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Mr. Green and Mr. Caldecott for the demurrer.—An account against the committee of a lunatic ought to be taken in Lunacy and not in Chancery. In *Re Fitzgerald* (a) Lord Redesdale said (b), “The control of this Court (over the committee) does not determine by the death of the lunatic. The committee continues liable to account and liable to all the consequences of any misconduct, and bound to act on delivery and possession as the Court shall direct.” The court referred to was the Chancellor sitting in Lunacy. If, then, the proper jurisdiction was in Lunacy, the Court of Chancery would not assume juris-

(a) 2 Sch. & L. 432.

(b) Ibid. 441.

diction "Where the powers of the ordinary courts are sufficient for the purposes of justice, and a plaintiff can have an effectual remedy in a court of law (*i.e.*, in another court), and that remedy is clear and certain. A demurrer will hold (*a*). To take any other view would be to leave the committee to be harassed by two proceedings in respect of the same matter, and that this Court never did. In fact, if this bill were maintainable, the committee must account twice, because the committee could not pass his accounts without an inquiry what money was in his hands from time to time: *Ex parte Catton* (*b*). Where a committee had failed to pass his accounts he would be charged interest on the balances in his hand: *Ex parte Hall, re Legard* (*c*). In *Ex parte Clarke* (*d*), it was held that there was no jurisdiction in Lunacy to try the question of heirship. [*Tharp v. Tharp* (*e*) was also cited.]

It was clear on these grounds that, even if the Court of Chancery has jurisdiction to take these accounts, the bill ought not to have been filed without leave.

The cases of *Grosvenor v. Drax* (*f*) and *Wigg v. Tiler* (*g*) would be cited in support of this bill, but those cases were distinguishable from the present. All that *Grosvenor v. Drax* decided was that on a petition in Lunacy the Lord Chancellor had no jurisdiction to charge a committee with the misapplication of the funds paid him for maintenance. In *Wigg v. Tiler*, there being a dispute between the next of kin and the heir-at-law of the lunatic, the Court directed a bill to be filed to take the accounts of the lunatic's estate. The point actually decided was that the Great Seal acted as a commissioner in the care of lunatics.

In *Re Gilbert* (*h*) the Lord Chancellor refused an

1862.
SCAMMELL
v.
LIGHT.
Argument.

(a) Mitford's Pl. ed. by Smith,

145.

(b) 1 Ves. 156.

(c) Jac. 160.

(d) Ibid. 589.

(e) 3 Mer. 510.

(f) 2 Knapp, P. C. 82.

(g) 2 Dick. 552.

(h) 1 Ball & Beatt. 297.

1862.
SCAMMELL
v.
LIGHT.
—
Argument.

inquiry in Lunacy as to the next of kin in order to distribute the funds.

[*Shelford on Lunacy*, 26, and *Elmer's Lunacy Practice* were also cited. See also *Sheldon v. Fortescue* (a).]

Mr. Bacon and Mr. Freeling, for the bill, were not called on.

Judgment. The VICE-CHANCELLOR:—

The cases of *Wigg v. Tiler*, *Grosvenor v. Drax*, and *Ex parte Gilbert* are distinct authorities in support of the jurisdiction of this Court to direct these accounts. This is a suit for the administration of the testator's estate and the accounts could not be properly taken in Lunacy, where all the proceedings were *ex parte*. For these reasons, and looking at the allegations of the bill as to the fraudulent dealings with the estate, and the collusion between the defendants, the demurrer must be overruled with costs.

Nov. 20, 21,
22, 24.
Dec. 4.

CLARKE v. MACKINTOSH.
MACKINTOSH v. CLARKE.

Where the vendors of a brewery made various and inconsistent representations as to the profits of the concern which demanded investigation, for which the vendors afforded every facility, and which the purchaser in fact partially made, the Court decreed specific performance.

THESE causes came on on bill and cross bill. The original bill prayed that a certain agreement dated the 16th August, 1861, might be specifically performed, and the cross bill prayed that the same agreement might be

performed.

(a) 3 P. Wms. 104.

declared void and delivered up to be cancelled. The cross bill stated that in June, 1861, the attention of Messieurs Mackintosh was directed to an advertisement which appeared in the *Times* newspaper on the 18th June, 1861, and which was in the following terms:—

1862.
CLARKE
v.
MACKINTOSH
MACKINTOSH
v.
CLARKE.
Statement.

“TO BREWERS. — Old-established and profitable London Brewery for disposal. Messrs. Peter Broad & Pritchard, are instructed to dispose of the interest in a well-known old established and highly lucrative brewery, situate in a central position, and commanding a very extensive and desirable connexion, which the present proprietor (who is retiring) has enjoyed for the last 30 years. The whole of the plant is in perfect working order, and the trade very recently has amounted to nearly 200 barrels weekly at good prices. The premises contain every possible convenience, are very commodious, and held under an exceedingly advantageous lease at a rental which produces a profit income of nearly 400*l.* per annum, allowing the occupation of the brewery, stables, and dwelling-house free. Principals who can command 7000*l.* to 8000*l.* may obtain every particular of Peter Broad & Pritchard, 28, Poultry, E.C.”

Upon seeing the advertisement Messrs. Mackintosh applied to Messrs. Broad & Pritchard, the agents, for the particulars, of which these gentleman gave them the following memorandum:—

“BREWERY—CLERKENWELL.

“Rent of the whole premises 400*l.* A portion is let off at 750*l.*, leaving the brewery and other part of the premises in the occupation of the proprietor. Lease 20 years. Premium 1500*l.* Goodwill 1*l.* per quarter. Fixtures, utensils, plant, and stock, at valuation. Doing 150 barrels weekly proof. Average 200 barrels yearly. The proprietor retiring after 30 years’ occupancy.”

1862.
 CLARKE
 v.
 MACKINTOSH
 MACKINTOSH
 v.
 CLARKE.

Statement.

Messrs. Mackintosh had some interviews with the defendant Clark and his son: They also received from Messrs. Broad & Pritchard the following letters:—

“ July 25th, 1861.

“ MR. CLARKE’S BREWERY.

“ Sir,—The present sale is 150 barrels weekly; of this 50 are to private families; he serves also one workhouse, a lunatic asylum, and several large establishments which pay well. The trade has been allowed to fall off entirely through non-application for orders, and can be increased to almost any amount.

“ Mr. Clarke is willing to contract to give you any information necessary for carrying on the business, and Mr. Clarke, junior, will remain with you until you are quite efficient in the art of brewing.

“ Mr. C. is willing also to give you full access to his books, and to render you good evidence of the genuineness of the business in all respects.

“ The retention or increase of the business will of course depend on the attention which is given by the successor of Mr. Clarke, but he has no hesitation in saying that, if the quality of the articles are maintained, and only an ordinary degree of attention paid, the business will immediately begin to extend. It will afford me much pleasure to supply.

N.B.—So in original.

“ I am, dear Sir, for partner and self,

“ Yours truly,

“ T. PRITCHARD.

“ J. D. Mackintosh, Esq.”

“ CROWN BREWERY.

“ July 30th, 1861.

“ Sir,—The following statement taken from the books shows the business for

CASES IN CHANCERY.

137

	Quarters Malt.	Barrels.	1863.
" 1858	1769	7501	CLARKE
" 1859	2034	7853	v.
" 1860	1618	6650	MACKINTOSH
			MACKINTOSH
			v.
	5421	22,004	CLARKE.
			Statement.

showing a consumption of 5421 quarters malt, and production of 22,004 barrels of beer of different descriptions.

"The deficiency of the last year we have before explained to you we believe satisfactorily, and have no hesitation in stating that a very largely increased business may immediately be done by the infusion of an ordinary amount of energy and the supply of an equally good article as that which has hitherto been produced.

"We shall be happy to give you further attention, or make any appointment you may propose with the proprietor. Waiting your reply, we are, Sir, yours truly,

"PETER BROAD & PRITCHARD.

"Thos. J. D. Mackintosh, Esq."

After some discussion the following agreement was executed, to which the schedules, containing a list of debtors, were added just before the execution of the agreement. Messrs. Macintosh paid by way of deposit 500*l*. The agreement was as follows :—

The said agreement was in the words and figures following, that is to say :—

"Memorandum of an agreement made and entered into this 19th day of August, 1861, between Charles Clarke, of the Crown Brewery, Little Sutton Street, Clerkenwell, in the county of Middlesex, brewer (hereinafter called the vendor), of the one part, and Thomas John Devereux Mackintosh, and Robert James Mackintosh, of Totteridge Lodge, Totteridge, in the county of Herts

Company, of 28, Old Bond Street, shall be the referees on behalf of the purchaser, and such referees shall, before entering upon the matter referred, and within one week after the execution of this agreement, appoint an umpire, and, if they do not decide the matter within three weeks after the execution of this agreement, the said umpire shall decide the same. (2) The purchase shall be completed on the 30th day of September next, and the vendor will, in and by the assignment of the said brewery to the purchasers, covenant with them that he will not at any time hereafter carry on the business of a brewer within ten miles of Little Sutton Street aforesaid. (3) The purchase-money shall be paid as follows, that is to say: 500*l.* on the execution of this agreement into the hands of the said Messrs. Peter Broad & Pritchard, on behalf of the vendor, 5500*l.* in cash to the vendor on the purchasers obtaining possession of the said premises, and the balance or remainder of the purchase-money by three approved bills of exchange of equal amounts, drawn by the vendor on and accepted by the said purchasers at twelve, eighteen, and twenty-four months' dates respectively, bearing interest at the rate of 5*l.* per cent. per annum from the date thereof, such balance to be further secured by a legal mortgage of the said leases, plant, and premises, to be executed by the purchasers to the vendor on their obtaining possession thereof. (4) The vendor shall, at his own expense, within fourteen days from the execution of this agreement, deliver to the purchasers or their solicitors an abstract of the title to the premises, commencing with the leases under which the same are held; such leases shall in all respects be deemed and taken to be well granted, and the vendor shall not be called upon or required to show or prove the lessor's title. (5) The last receipt for payment of rent due in respect of each of the said leases shall be accepted by the pur-

1862.
CLARKE
v.
MACKINTOSH
MACKINTOSH
v.
CLARKE.
—
Statement.

1862.
CLARKE
v.
MACKINTOSH
MACKINTOSH
v.
CLARKE.
—
Statement.

chasers as conclusive evidence of the due performance of all the covenants and conditions in the said leases respectively up to the time of the completion of the sale hereby agreed to be made. (6) All outgoing's up to the said 30th day of September shall be paid by the vendor. (7) The purchasers shall pay and bear the expense of all such assignments and assurances as they shall require of the said premises, and shall also pay the vendor's costs, charges, and expenses of and incidental to the preparation and execution of the legal mortgage hereinbefore mentioned. (8) And whereas the vendor has lent and advanced to the several persons named in the first schedule hereto the several sums of money set opposite to the respective names therein: And it is hereby agreed that the said purchasers shall take to such loans or the amounts due in respect thereof (amounting to 1118*l.* or thereabouts) on the 30th day of September next, and the amount of the monies then due in respect of such loans shall be included in and form part of the balance to be secured to the vendor in manner hereinbefore mentioned. (9) And whereas the several debts or sums of money mentioned in the second schedule hereto are also due from the several persons therein named to the vendor in his said business of a brewer, now it is hereby agreed that the said purchasers shall take to such debts, or the amounts due in respect thereof, on the said 30th day of September next, and that the amount then due in respect of such debts shall be included in and form part of the balance to be secured in manner hereinbefore mentioned. (10) And whereas there are several debts also due to the said vendor from the private customers of the said brewery, amounting to the sum of 1000*l.* or thereabouts, it is hereby agreed that the said purchasers shall receive such last-mentioned debts for and on behalf of the said vendor, and pay over the same to him as and when received, after

deducting therefrom a commission of 5*l.* per cent. for the collection and receipt thereof.

(Signed)

“ CH. CLARKE.

“ T. J. D. MACKINTOSH.

“ R. J. MACKINTOSH.

1862.

CLARKE

v.

MACKINTOSH

MACKINTOSH

v.

CLARKE.

Statement.

“ Witness :

“ PETER BROAD.”

In the schedule to the agreement there was a list of debtors to the concern, whose debts amounted to nearly 1200*l.* Messrs. Tuke & Valpy, acting for the plaintiffs, subsequently on the 7th October, 1861, complained that they had been greatly imposed on and deceived as to the nature and character of the said business. The alleged misrepresentation as set out in the cross bill was as follows :—

The plaintiffs charge that the said printed advertisement and the further memorandum furnished by the defendant's agents, and the letters hereinbefore set forth, and also the said agreement itself, contained statements and representations which as to some important particulars are entirely untrue, and as to others are grossly exaggerated and deceptive.

In particular the plaintiffs show that the said business is not in fact a profitable or highly lucrative brewery, nor does it in fact command a very extensive or desirable connexion, but that on the contrary very small profits (if any) have been obtained therefrom, and even actual loss has at times been sustained, and that so it would appear if the defendant would set forth, as he ought, a full true and particular account or statement of the quantity and quality of beer brewed at the said brewery during the years 1859, 1860, and 1861, and sold during such years successively to the customers of the said brewery, and of the prices at which the same was sold, and other particulars relating thereto.

1862.
 CLARKE
 v.
 MACKINTOSH
 MACKINTOSH
 v.
 CLARKE.
 Statement.

It is not true that the trade in the said business has very recently been carried on at good prices, inasmuch as from about the commencement of the year 1861 to the 27th day of July in the same year the greater part of the trade, which has amounted to an average rate of 106 barrels only per week, was done at low prices, averaging on the entire sales only 28s. per barrel, subject to a discount of at least 5l. per cent., which would barely yield any profit.

There is not a single large establishment served by the defendant, except the workhouse and asylum before-mentioned, and the latter are supplied at exceedingly low and unremunerative contract prices; and a considerable part of the consumption is not such as the purchasers could command, two of the largest public-houses being free, and the tenant (who is the aforesaid son of the defendant) is not subject to the usual obligations to take beer from the defendant, or his successors in the business; and the entire connexion is moreover very undesirable.

The rental at which the lease of the said premises is held, as mentioned in the said advertisement and memorandum, and the existing sub-tenancies, do not in fact produce a profit income of 400l. or even 350l. per annum, or any sum at all approaching the sums so stated in the said advertisement and memorandum, inasmuch as the gross rental (after deducting the rates, taxes, and insurance payable by the landlord) amounts only to the nominal sum of 601l. 15s., without making any allowance for repairs, non-occupation, or bad debts.

The greater portion of the property is let to weekly tenants in a very low and in some cases disreputable condition of life, and the rents are precarious and insecure, and difficult to collect.

The plaintiffs further charge that several of the sums mentioned in the first schedule to the said agreement, and in particular the sums therein numbered 3, 6, and 10, and

in the said agreement stated and represented to have been lent and advanced to the several persons named in the said schedule, were never in fact lent or advanced at all to those persons respectively, nor are such sums, or any of them, or any part thereof respectively, now in fact owing by such persons respectively.

Several of the debts or sums of money mentioned in the second schedule to the said agreement, and in particular the sums therein numbered 4 and 5 are not in fact due or owing at all from the several persons therein named to the defendant, as untruly stated and represented in the said agreement.

None of the said debts are properly secured, and a large portion thereof are bad, and others are doubtful.

Mr. Clarke, in his answer to the cross bill, denied generally the allegations in the cross bill. The 21st and 23rd paragraphs were as follows:—

It is the fact that the rental at which the lease of the premises is held, as mentioned in the said advertisement and the memorandum hereinbefore set forth, and the existing sub-tenancies, do not produce a profit income of 400*l.* or even 350*l.* per annum; but I say that the plaintiffs ascertained and were well aware of that fact before they executed the said agreement of the 19th of August, 1861. The net rental of the said premises, after deducting the rates, taxes, and insurance payable by the landlord, amounts to 542*l.* 6*s.* or thereabouts, including 320*l.* a year as the estimated rent of the brewery premises since the year 1859, when I obtained my present lease of the said premises, and expended a sum of 1800*l.* thereupon; scarcely any repairs have been needed thereto, and my bad debts in respect of the said premises have been very small. In the first part of the said schedule hereto I have to the best of my recollection and belief set forth what is the amount paid by me in each year for rates, taxes, and insurance, and what has been the amount

1862.
CLARKE
v.
MACKINTOSH
MACKINTOSH
v.
CLARKE.
Statement.

1862.
CLARKE
v.
MACKINTOSH
MACKINTOSH
v.
CLARKE.

Statement.

expended in repairs upon the said brewery and premises during the last three years, and what losses have been sustained during the same period on account of bad debts or non-occupation of the premises included in the afore-said sale.

It was part of the said agreement of the 19th day of August, 1861, between the defendants and myself that they should on the 30th day of September then next (the day fixed for the completion of the said purchase), take to the loans mentioned in the first schedule to the said agreement, or the amounts due in respect thereof, on that day, and that the amount of the moneys then due in respect of such loans should be included in and form part of the balance to be secured to me in manner in the said agreement mentioned. A list of the bills, notes, and securities held by me for the said loans was furnished by my said solicitor to the plaintiffs' said solicitors on or about the 17th day of September, 1861, as hereinbefore stated, and no objection thereto was raised by or on behalf of the plaintiffs until after the time fixed for the completion of the said purchase.

Mr. Clarke, in his affidavit filed the 23d April, 1862, deposed as follows:—"Messrs. Mackintosh called on Messrs. Broad & Pritchard shortly after the date of the advertisement, and obtained further particulars. On the 24th June, 1861, they called on me at the brewery. It being a busy day, I did not myself show them over the brewery, but directed my son George Clarke to do so, which he accordingly did, and he informed me that he truthfully answered all the inquiries made respecting the business. On the 23d July, 1861, Mr. T. J. D. Mackintosh called at the brewery, and, after stating that he and his brother were ready to treat for the purchase of the brewery, commenced a negotiation with me for that purpose. I then personally took T. J. D. Mackintosh over the brewery, and showed him the premises. He made

various and minute inquiries of me as to the nature and character of the business, which I answered truthfully, and gave him free access to the trade books and rent account. T. J. D. Mackintosh made several further calls at the said brewery, on which occasions he made many minute inquiries, both of me and my son and of my cashier John Penfold, as to the business, and inspected my trade books, rent accounts, and made various calculations for the purpose of testing for himself the trade and profits of the said business, and the rents received in respect of the said premises. I say I gave the said defendant every facility for examining and satisfying himself as to the nature and character of the business and the profits. I never told the defendants that any specific sum could be realised by the business, but I told them on one occasion that, if they did as well as I had done, they would not have any reason to complain.

"I say it is not the fact, as stated in the 9th paragraph of the answer, that the said Messrs. Mackintosh relied on the representations said to be made to them by me and my agents. I say that the defendant T. J. D. Mackintosh called at least seven or eight times at the brewery, and spent as much time there as he pleased in examining the business books and state of the trade done there, and in testing the accuracy of the statements respecting the same made by me or on my behalf. On one of such occasions my son George Clarke was engaged nearly 2 hours with T. J. D. Mackintosh in going through and explaining the business and rent books, and, as my son informed me, Mr. T. J. D. Mackintosh stated he admired the way the books were kept, and, as my son informed me, he examined the rent book with considerable care, and made many inquiries and observations as to the rental, and made various calculations with a view of ascertaining and satisfying himself as to the net profit rental, and upon another occasion said I had not allowed for rates

1862.
 CLARKE
 v.
 MACKINTOSH
 MACKINTOSH
 v.
 CLARKE.
 Statement.

1862.
 CLARKE
 v.
 MACKINTOSH
 MACKINTOSH
 v.
 CLARKE.
Statement.

and insurance and taxes, and after deducting all outgoings for repairs and other incidental expenses he expressed himself satisfied with a rental of from 250*l.* to 300*l.* a year, exclusive of the brewery premises. Messrs. Mackintosh, if they wished, could have employed any person to examine and judge of the value of the said business, to advise and assist them in making inquiries and investigations before entering into the contract.

“I believe the defendants were perfectly satisfied with the result of the various inquiries they had made before they made an offer to purchase the said business, and I believe that on the 7th August, 1861, it was agreed between Mr. Broad and the defendant T. J. D. Mackintosh that he should prepare the heads of an agreement between the defendants and myself. And on the 14th day of August T. J. D. Mackintosh called at the brewery and informed me of an appointment to attend at the office of Messrs. Broad & Pritchard on that day. I accordingly attended at the said office, when the draft of the heads of an agreement embodying the terms upon which such sale and purchase as aforesaid were to be made was drawn out by Mr. Peter Broad, and afterwards delivered to the defendant T. J. D. Mackintosh for the consideration and approval of himself and his brother. Mr. Broad did not object to the draft being shown to the defendants’ solicitors, which they had ample time to do. The draft remained in their possession till the 16th August, when it was returned to Messrs. Broad & Pritchard signed and approved by them.

“Before the defendants signed the formal agreement they could, if they had thought fit, have verified the rental and statement respecting the loans and debts to be taken to by them by simply expressing a wish to that effect (which, however, they never did), or by declining to execute the said agreement until they were satisfied about the accuracy of the said recital or statement, and

I say that before the said agreement was signed by the said defendants the defendant T. J. D. Mackintosh asked Mr. P. Broad whether it was necessary that they should take to the said debts and loans, and on being informed by Mr. P. Broad that it was necessary in order to secure the custom of the brewery, the defendants executed the agreement."

1862.
CLARKE
v.
MACKINTOSH
MACKINTOSH
v.
CLARKE.
—
Statement.

George Clarke, the son of the plaintiff in the original bill, deposed as follows:—"On the 24th June, 1861, the defendants called at the brewery to view the premises. I was desired by the plaintiff to show them over the brewery.

"A few days after the 23rd the defendant T. J. D. Mackintosh called again at the brewery, and examined the trade books and books of account kept by the plaintiff in his business, and I assisted him in so doing, and was engaged for nearly two hours showing him the said books and explaining to him the way they were kept, when he expressed his admiration of the way in which the said books were kept, and asked me how long I thought his brother, R. J. Mackintosh, would be in learning the way to keep the said books. A short time afterwards T. J. D. Mackintosh called again at the brewery, and made various inquiries of me relating to the business. I observed to him that I had turned out a much larger number of barrels when I was countinghouse clerk than were then being turned out, and he inquired why we were not doing so much trade then, and I told him, as the fact was, that the plaintiff was not pushing the business, and that at that time, in consequence of the badness of the brewery trade, it was no advantage to push the trade, as it was likely a brewer would rather lose than gain by so doing. The defendant appeared to be satisfied, and, being anxious to remain in the business, I offered to bring in 2000*l.* on some partnership terms, upon which the defendant said he thought the present trade profit would

1862.
CLARKE
v.
MACKINTOSH
MACKINTOSH
v.
CLARKE.
Statement.

not be sufficient for three, and that we had better wait a year. He made various other calls at the brewery before signing the agreements. I believe he called ten or twelve times, and on these occasions he made many minute inquiries, both of me and of the cashier, respecting the trade carried on at the brewery; he carefully examined on several occasions the trade books. He also examined the rent books, and made many enquiries and observations as to the rental of the premises. He himself made various calculations respecting the same, and on one occasion he observed that in the particulars supplied to him by Messrs. Broad & Pritchard no allowance had been made for rates, insurance, and taxes, and ultimately, after deducting all outgoings for repairs and other expenses, he expressed himself satisfied with a rental of from 250*l.* to 300*l.* a year, exclusive of the brewery premises. The plaintiff (Clarke) instructed and directed me to give Messrs. Mackintosh every opportunity to examine the brewery and the trade books, books of account, rent books, and in connexion therewith to render them every assistance in my power in enabling them fully to examine and investigate the same, and I say I did render them all the assistance I could.

There was a great deal of evidence on behalf of Messrs. Mackintosh, for the purpose of proving misrepresentations as to the value of the business. They denied positively ever having examined the books at all, but stated they relied entirely on the representations of Mr. Clarke and his son. On the subject of the book debts Mr. T. J. D. Mackintosh deposed as follows:—

“ On the 19th day of August I and my brother accordingly attended at the office of the said Messrs. Broad & Pritchard, where we met the plaintiff and his said son, and the said Mr. Peter Broad. I asked him, the said Mr. Peter Broad, if he had prepared the agreement between us and the said George Clarke, and he said he

had not, but would have it done at once, and called a clerk, and directed him to draw it out. Mr. Peter Broad then read to us the agreement for the purchase of the said brewery and leasehold premises, when to my surprise I found it contained two schedules of loans and debts to be purchased and taken to by us, of which no statement or allusion of any kind was contained in the heads of the agreement previously delivered to me as aforesaid. I inquired of the said Mr. Peter Broad whether it was absolutely necessary for us to take these debts and loans, to which he replied, in the hearing of the plaintiff and his son, that it was necessary for us to do so, in order to secure the custom, and the plaintiff thereupon added there was a value for everything. I and my brother believed that what was thus told to us was true, and we both then, in such belief, signed the agreement. We afterwards, at the same interview, signed the agreement with the said G. Clarke, which had been prepared in the interval."

On the subject of the rental, Mr. Thomas, the brewery valuer, deposed that, from the accounts and receipts produced, which he had carefully examined, he was enabled to state positively that the gross rental amounted only to the sum of 690*l.* 9*s.*; rates, taxes, and insurance, 206*l.* 1*s.* 5*d.* Deducting from that 35*l.*, as applicable to the brewery, the rates and taxes would be 171*l.* 1*s.* 5*d.*, which, being deducted from the gross rental of 690*l.* 9*s.*, gave net 519*l.* 7*s.* 7*d.*, which, after payment of the ground-rent (400*l.* a year) and the necessary allowances for repairs, loss from non-occupation, bad debts, and other casualties, would, in fact, be no profit income at all. A very large proportion of the houses were let upon weekly or monthly lettings, and it was the invariable custom on such holdings to make an allowance for repairs, non-occupation, and losses, as well as for rates, taxes, and insurance. Several of the tenants were considerably in arrear, two of them owing nearly a year's rent, and others owing

1862.
 CLARKE
 v.
 MACKINTOSH
 MACKINTOSH
 v.
 CLARKE.
 Statement.

1862.
 CLARKE
 v.
 MACKINTOSH
 MACKINTOSH
 v.
 CLARKE.
 —
Statement.

from three to six months' rent, and such rents were generally difficult to collect.

Mr. Thomas also set forth an estimated profit and loss account for the four years 1858, 1859, 1860, and 1861, in which he stated that, from the figures taken from Mr. Clarke's books, he made the profits for the four years 647*l.* 19*s.* 4*d.*, giving an average profit of about 160*l.* a year.

Mr. Thomas also deposed as follows:—"Having read the advertisement, and the memorandum and letters set forth in the 2nd, 3rd, 6th, and 8th paragraphs of the defendants' answer, and compared the statements and representations therein made with the result of my investigation as aforesaid, and the account therein made up as aforesaid, I state that Mr. Clarke's brewery, called the "Crown Brewery," is not a profitable business or highly lucrative brewery, or "well known," in the ordinary acceptance of that term, in the trade; and such brewery does not command a very extensive and desirable connection; and that the trade has not for several years or very recently amounted to nearly 200 barrels weekly, at good prices, and the premises are not held under an exceedingly advantageous lease, at a rental which produces a profit income of nearly 400*l.* per annum, allowing the occupation of the brewery stables and dwelling-house free; and the plaintiff did not, at the date of the aforesaid agreement, serve, besides one workhouse and a lunatic asylum, several large establishments which paid well; and I say that the representations so made in such advertisements, memorandum, and letters cannot be substantiated by reference to the plaintiff's books or vouchers, and such representations, if at all relied on, would greatly mislead an intending purchaser, and they are wholly unfair if taken as a basis of a contract for the purchase and sale of the said business."

Mr. *Malins*, Mr. *Greene*, and Mr. *Fischer* for the plaintiff *Clarke* in the original suit.

The defence to this suit set up by the cross bill is misrepresentation; but that defence must fail on two grounds—first, because the alleged misrepresentation was nothing more than certain trifling errors, insufficient to invalidate the contract; and secondly, because the defendants did not rely on the representations, but had the means of investigation, and did in fact make such investigation of the facts.

As to the first point the cases were express. In *Jennings v. Broughton* (a), the marginal epitome was this:—“Misrepresentations, to constitute sufficient grounds for setting aside a purchase, must be material, as being of such a nature as, if true, to add to the value, and must not be evidently merely conjectural statements, and must be made without a belief in their truth, or without reasonable grounds for such belief.” In *Hanson v. Scott* (b), a piece of land imperfectly watered was described in the particular as uncommonly rich water meadow, and it was held that this was not such a misrepresentation as would avoid the sale. In *Dyer v. Hargrave* (c), the Court decreed specific performance of the agreement, though there was a clear variance from the description, both as to the state of the house and the cultivation of the land, and awarded compensation. The principle was whether the purchaser got substantially the thing he bargained for. In *Loundes v. Lane* (d), the woods, which were a material part of the subject matter, were described as producing 250*l.* per annum on an average of the fifteen preceding years, which was produced by being improperly cut, as to which the purchaser had the means of forming a conclusion. As to this it was held that the purchaser was not even entitled to compensation; but as to the tithes the Lord Chancellor held that there had been actual misrepre-

1862.
CLARKE
v.
MACKINTOSH
MACKINTOSH
v.
CLARKE.
—
Argument.

(a) 5 De G. M. & G. 126.

(b) 1 Sim. 13.

(c) 10 Ves. 505.

(d) 2 Cox. 364.

1862.
 CLARKE
 v.
 MACKINTOSH
 MACKINTOSH
 v.
 CLARKE.
 ———
Argument.

sentation, and directed, not the cancelling of the contract, but compensation. There was a great distinction between those cases where the purchaser had the means of satisfying himself of the truth of the particulars, and those where he relied on mere representation. Thus, in *Johnson v. Smart* (a), where a house was described as substantial and convenient, and having five bed-rooms, it was held that this was no misrepresentation, although the house was out of repair, and the walls in some places were only half-brick thick, and some of the bed-rooms extremely small inner rooms without a fireplace, and the Court decreed the agreement to be specifically performed. Here the errors in the description might perhaps entitle the purchaser to compensation, but on all the authorities there was clearly no ground for invalidating the contract.

But, secondly, it was proved that the purchasers had investigated the accuracy of the representations, and had relied on the result of these investigations; but, if so, they could not now set them up as a ground for not performing their contract. In *Clapham v. Shillito* (b), it was laid down that, if the party to whom the representations were made himself resorted to the proper means of verification before he entered into the contract, it might be that he relied on the result of his own investigation and inquiry, and not upon the representations made to him by the other party. Or, if the means of investigation and verification were at hand, and the attention of the party receiving the representations were drawn to them, it might be incumbent on a court of justice to impute to him a knowledge of the result which, upon due inquiry, he ought to have obtained, and the notion of reliance on the representations excluded. The present was exactly the case here put as nearly as possible by the Master of the Rolls, and the defendants

(a) 2 Giff. 151; affirmed on appeal, July 21st, 1860. (b) 7 Beav. 146.

could not now ask the Court to relieve them from the obligations into which they had entered on the ground of misrepresentation, even if it were proved. In *Jennings v. Broughton* (a), advertisements for the sale of shares in a mine had been issued containing unfounded statements; but the purchase had not relied on them, and had opportunities of judging of their accuracy, and he was held not entitled to have the contract rescinded. Applying the principles there laid down, it was clear that in this case the purchasers could not complain of being misled, whatever had been stated in the advertisements.

On these grounds it was submitted that the Court would decree specific performance of the agreement and dismiss the cross bill with costs: *Oldfield v. Round* (b), *Vigers v. Pike* (c), *Jackson v. Jackson* (d), were also cited.

Mr. Bacon and Mr. Jones Bateman for Messrs. Mackintosh, the defendants in the original bill.

It was quite clear that there had been misrepresentations more or less. That was not indeed denied by the plaintiff, though he alleged they were of small moment. It was equally clear that but for those misrepresentations the defendants never would have entered into the contract. They were assured that a large number of barrels were brewed at this brewery weekly, and that there was a large profit realised from the brewery, and on the rental. These representations in a greater or less degree were untrue, but a party obtaining an agreement by a partial misrepresentation was not entitled to a specific performance. The effect of such misrepresentation was to destroy the agreement: *Clermont v. Tasburgh* (e). There were numerous cases in which the Court acted on this principle. In *Higgins v. Samels* (f), where a plaintiff himself,

1802.
 CLARKE
 v.
 MACKINTOSH
 MACKINTOSH
 v.
 CLARKE.
 Argument.

(a) 5 De G. M. & G. 126.

(d) 1 Sma. & G. 184.

(b) 5 Ves. 508.

(e) 1 Jac. & W. 112.

(c) 8 Cl. & Fin. 562; s.c.

(f) 2 Joh. & H. 460.

2 Dr. & Walsh, 1.

1862.
 CLARKE
 v.
 MACKINTOSH
 MACKINTOSH
 v.
 CLARKE.
 —
Argument.

ignorant of the quality of certain limestone, represented it as of better quality than it was, and the defendant visited the quarry and might have ascertained, but did not ascertain the quality, the Court refused specific performance of the agreement. That was a far stronger case than this.

In *The New Brunswick and Canada Company v. Muggeridge* (a), it was held that a person contracting to take shares on the faith of the statements contained in the prospectus has a right to be protected not only against misstatements actually false, but has also a right to be informed of all the facts, the knowledge of which might have reasonably deterred him from contracting; and if the prospectus in that sense contains misrepresentation, or the absence of true representation, the contract would not be enforced. For the word "prospectus" substitute "advertisement," and that was exactly this case. In *Reynell v. Sprye* (b) it was held that, where one of the parties to a negotiation induces the other to contract on the faith of representations, any one of which is untrue, the whole contract is to be considered as having been obtained fraudulently. Nor is the case varied by the circumstance that the untrue representation was in the first instance the result of innocent error, if after it was discovered the author of the representation allowed the other to continue in it. In *Rawlins v. Wickham* (c), where the plaintiff by misrepresentation had been induced to become partner, four years afterwards on the bank being insolvent he was held entitled to have the contract rescinded, and to have an indemnity against the debts of the concern: *à fortiori* the Court would not decree an agreement obtained by misrepresentation to be specifically performed.

On these grounds it was submitted that the Court

(c) 1 Dr. & S. 363.

(e) 1 Giff. 355; s.c. 3 De G.

(d) 1 De G. M. & G. 660, 708. & J. 304.

would not decree specific performance, but, if it did not cancel the agreement, would leave the plaintiff Clarke to his remedy at law. [*Harris v. Kemble* (a), *Price v. Macaulay* (b), *Small v. Atwood* (c), *Cadman v. Horner* (d), and *Martin v. Cotter* (e), as to duty of seller, also cited.]

1862.
CLARKE
v.
MACKINTOSH
MACKINTOSH
v.
CLARKE.
Judgment.

The VICE-CHANCELLOR:—

The purchasers have resisted specific performance, not merely by their answer, but they have by their cross-bill prayed to have the agreement declared to be void, and to have it delivered up to be cancelled, on the ground that they were induced to enter into it by deception and misrepresentation. The alleged misrepresentations are upon the material points referred to three several matters. These are, first, as to the number of barrels of beer weekly produced and sold in the brewery which was the subject of the contract; secondly, as to the clear rental of the leasehold property; thirdly, as to the loans or debts due to the concern, which it was agreed should be taken by the purchasers.

There is no doubt that if the purchasers could show that they contracted to buy in absolute and express reliance on the truth of representations which turn out to be false, and without resort to other means of information by which the truth might be sufficiently disclosed, they ought not to be compelled to perform the contract. But a purchaser is bound to exercise a reasonable degree of caution. Therefore, if there be anything in the nature or circumstances of the representations made by the vendors calculated to excite suspicion, or to require explanation or investigation, the purchaser is bound to be on his guard, and must bear the consequence of any negligence on his own part; much more, if the pur-

(a) 2 Dow. & Clk. 463.

(d) 18 Ves. 10.

(b) 2 De G. M. & G. 339.

(e) 3 Jo. & Lat. 496. !

(c) 1 Y. Ex. 407, 460.

1362.
 CLARKE
 v.
 MACKINTOSH
 MACKINTOSH
 v.
 CLARKE.
 Judgment.

chaser, not satisfied with the representations, proceeds to investigate and inquire for himself, and has the fair opportunity of testing the accuracy of what the seller has represented, he must abide by the consequences, and the seller in general is relieved from responsibility.

In the present case the representations as to the number of barrels of beer produced and sold, and as to the profit rental on the leasehold property, were so various and irreconcilable and vague as to put any purchaser of reasonable prudence on his guard, and to induce him to make investigation. First, as to the number of barrels of beer, the advertisement stated that "the trade very recently has amounted to nearly 200 barrels weekly, at good prices." The particulars in writing, furnished by the agents for sale, said, "doing 150 barrels weekly." The agents' letter of the 25th July, 1861, said, "the present sale is 150 barrels weekly." The purchasers, in their answer, say they did not consider that this letter gave the information required, and that they asked for a particular statement of the business done. Accordingly, in the letter of the 30th July, 1861, the vendor's agents had a return of the number of quarters of malt and barrels of beer taken from the books for the years 1858, 1859, and 1860, and the accuracy of the representation in this letter is not impeached.

As to the second head of alleged misrepresentation—namely, the profit rental on the leasehold property—the representations in the advertisement and afterwards in the particular in writing delivered by the agent are so vague and inconsistent that no prudent purchaser could be satisfied without further inquiry.

And as to the third matter, the loans or debts due to the concern, there is no doubt a misrepresentation in a literal sense, but not in the substance; and before the time fixed for the completion of the agreement particulars on this point were asked for by the purchasers' solicitors

in the letter of the 13th September, 1861, and supplied by the vendor's solicitor's letter of the 17th September, 1861, so as to give a full and accurate representation on this head, with which the purchasers' solicitors appear to have been satisfied.

The various and inconsistent representations on the two first matters not only called for investigation on the part of the purchasers, but they, in fact, went to investigate; and one of them, in particular, went repeatedly to the brewery, had the books produced to him, saw the leasehold property, had every facility afforded for full and fair investigation, and, after that investigation had been prosecuted at intervals during a period of twelve days as far as the purchasers thought proper, the heads of the offer to purchase were dictated by one of the purchasers to the agent of the seller, and that offer was duly accepted. Afterwards the more formal instrument of contract was approved by the solicitor of the purchasers, who introduced an important stipulation for the benefit of the purchasers.

When the purchasers took upon themselves to investigate, and had a full and fair opportunity to test the accuracy of what had been represented by the seller, it is no excuse to say that the investigation made by themselves was loosely or carelessly made, or that their solicitor acted in a cursory manner. There is no evidence whatever to show that during the investigation anything was concealed, or withheld, or hurried on the part of the vendor. It was argued for the purchasers that, by allowing their new agents to investigate the books and other matters after the time for the completion of the purchase was past, the vendor, in fact, admitted that no effectual investigation had been previously made. But the conduct of the vendor in permitting that subsequent investigation is a strong proof of the *bona fides* and honesty with which he acted.

1862.
CLARKE
v.
MACKINTOSH
MACKINTOSH
v.
CLARKE.
Judgment.

1862.
 CLARKE
 v.
 MACKINTOSH
 MACKINTOSH
 v.
 CLARKE.
 Judgment.

This case is free from the difficulty which has sometimes occurred of defining the extent to which the maxim *Caveat emptor* should be applied. Lord Thurlow, in the case of *Lowndes v. Lane* (a), said that, for the sake of certainty in the transactions in this Court, he should be willing to carry that maxim to a great extent; and he held the purchaser bound to a contract, notwithstanding a misrepresentation by the vendors as to the yearly produce of woods, because the purchaser, not relying on the representation, had sent his own surveyors to inquire. But, where there was an actual misrepresentation as to tithes against which the purchaser had no opportunity of guarding himself, relief was given. The true principle, stated by Lord Holt, was adopted by Lord Tenterden in the case of *Dobell v. Stevens* (b), and it is this, "If the vendor gives in a particular of the rents, and the vendee says he will trust him and inquire no further, but rely on his particular, then, if the particular be false, an action will lie." In the present case the purchasers did not rely on the representations of the vendor, but inquired for themselves, and were supplied with all fair means of prosecuting their inquiry. After that inquiry they deliberately entered into the contract, and they must be decreed specifically to perform it, and to pay the costs of the original suit. The cross bill by the purchasers must be dismissed with costs.

(a) 2 Cox, 363.

(b) 3 B. & C. 625.

PRIDEAUX v. LONSDALE.

THIS bill was filed by Thomas Prideaux against the trustees of a settlement, executed by the plaintiff's late wife, prior to her marriage, and against her next of kin at her decease, and as amended it prayed as follows:—

1. That it might be declared that the settlement, dated the 11th May, 1859, ought, under the circumstances, to be delivered up to be cancelled.

2. That it might be declared that, under the circumstances, the transfer by the defendant Moulton of the sum of 1101*l.* 18*s.* 6*d.* Three per Cent. Reduced Annuities, into the names of the said Lucy Mills Lonsdale, Robert Edward Lonsdale, and Richard Maitland Mills, was a breach of trust by the said Richard Moulton.

3. That R. E. Lonsdale, and R. M. Mills, might be decreed to transfer into the name of the plaintiff the sum of 1101*l.* 18*s.* 6*d.* Reduced Annuities, standing in their names, and in that of Lucy Mills Lonsdale, deceased, with all dividends accrued thereon, and that in the meantime the same might be secured in this Court, or that the defendant Moulton might be decreed to transfer a like sum into the plaintiff's name.

The amended bill stated that the plaintiff for more than eighteen months prior to April, 1859, was engaged to be married to his late wife; and such engagement was known to the defendant Richard Moulton. The celebration of the marriage had been delayed, waiting for an increase of income to enable him to maintain his wife; but they were accepted and known as engaged persons. Early in April the plaintiff was informed by his late wife, that a considerable sum of money had been left her by Mrs. Child, who died on the 10th March, 1859; and thereupon the plaintiff obtained his late wife's consent that the

1863.

Feb. 16th and March 20th.

A settlement made by a woman of her personal property after her engagement to be married set aside at the suit of the husband, although he was told before the marriage that she had executed a settlement affecting her property. It appearing that neither she herself nor her husband was accurately informed of the nature and effect of the trusts of the settlement—*Held*, that the doctrine of constructive notice of the contents of an instrument was not sufficient to bind the husband on the ground of acquiescence.

Suppression of the truth, or misrepresentation of a material fact, will vitiate any contract or gift the validity of which depends upon the truth and accuracy of the representation on which it was made.

1863.
PRIDEAUX
v.
LONSDALE.
—
Statement.

marriage should take place the following June. The plaintiff then understood from his late wife that there was a legacy of 1000*l.*, and also a share in the residuary property of Mrs. Child. In the month of May the plaintiff was, in the course of conversation, informed by his intended wife that her money, meaning the legacy, had been invested in the funds, and that she had been to the defendant Moulton, who is a law stationer, and one of the two executors of Mrs. Child's will, and signed some document, the effect of which she was informed by Richard Moulton was to prevent her brother, the defendants Lonsdale, troubling her for money, and her spending it without the intervention of her uncle, Mr. Christopher Lonsdale, the other executor. The plaintiff was on terms of intimacy with the defendants, R. M. Lonsdale, C. and W. J. Lonsdale; and not wishing to interfere between his intended wife and brothers, made no enquiries of her about the matter.

The plaintiff and his wife, in pursuance of their engagement, were married on the 16th July, 1859.

In October, 1859, the plaintiff was requested by his wife to go with her to receive her dividend on the funds, representing her legacy under Mrs. Child's will, the dividends of which were then payable; and with a view to obtain such dividends the plaintiff and his wife attended at the Bank of England, the plaintiff's wife having the same day handed to him a stock receipt for 1101*l.* 18*s.* 6*d.* Three per Cent. Reduced Annuities. On attending at the Bank and producing the receipt the plaintiff, for the first time, ascertained that the said sum was standing in the names of his wife, and the defendants R. E. and R. M. Mills, and he immediately told his wife that this mode of investment of her money seemed a bad arrangement, and one to which he objected. The plaintiff's wife shortly afterwards told him that she had been to Mr. Yetts, who, the plaintiff knew, had been her

solicitor previously to her marriage, with a view of getting it altered, and had asked him to make a will for her, giving the stock to her husband; but Mr. Yetts told her it was not necessary for her to make such a will, as, of course, the stock would be his on her death, if he survived her. The plaintiff was satisfied with this explanation, and made no further inquiry on the matter, feeling satisfied that his wife's property could not be dealt with without his sanction, and that his interest in it was safe.

On the 17th February, 1860, Mr. Christopher Lonsdale, the uncle of the plaintiff's wife, who was one of the executors of Mrs. Child's will, met the plaintiff and his wife for the purpose of paying her the balance of her share in the residue of Mrs. Child's property, and stated the amount to be 146*l.* 16*s.* 1*d.*, and gave them a statement of the residuary account, and asked them to sign a joint receipt for the sum of 146*l.* 16*s.* 1*d.*, and on such receipt being signed by the plaintiff and his wife, Mr. C. Lonsdale gave her a cheque for 146*l.* 16*s.* 1*d.* The plaintiff then stated he understood his wife had signed some document, and asked the nature of it. He gave no explanation about it, and said Mr. Moulton had it. The payment and receipt given as above confirmed the plaintiff's belief that nothing could be done with the said stock without his sanction, and that his interest was safe; and from the communication made to him by his wife of what Mr. Yetts had said to her, he did not then think it necessary to make any further inquiries about the said document.

The plaintiff's wife died on the 30th January, 1862, without children. The plaintiff invited to the funeral, among other relatives of his wife, the defendant R. E. Lonsdale, and after it was over R. E. Lonsdale asked the plaintiff if there was any will by his late wife as to the disposition of the property, of which he was trustee, under a document executed by her. The plaintiff replied

1863.
PRIDEAUX
v.
LONSDALE.
—
Statement.

1863.

PRIDEAUX

v.
LONSDALE.*Statement.*

he did not know that there was any will, or that any will was necessary, and that he understood from his wife the document was to protect the money from the influence of her brothers; however, he said he would see Mr. Moulton, and ascertain the nature of the document, and, if necessary, consult his solicitor.

A few days afterwards the plaintiff called on the defendant Moulton, who stated, in answer to the plaintiff's inquiry whether it barred his rights in the property, that, unless his wife had left a will, he considered it would. The defendant Moulton said the document had remained in his hands until the day after the funeral, when he had handed it over to the defendant R. E. Lonsdale, who had deposited it with Mr. Jennings' solicitor. He, Moulton, accompanied the plaintiff to Mr. Jennings, solicitor, who read it to the plaintiff, and promised to send him a copy, which he did a few days afterwards.

The settlement was as follows:—

“This indenture, made the 11th day of May, A.D. 1859, between Lucy Mills Lonsdale, of No. 4, Beaufort Street, Chelsea, in the county of Middlesex, spinster, of the one part, and Robert Edward Lonsdale, of No. 26, Old Bond Street, in the said county, music seller, and Richard Maitland Mills, of No. 140, New Bond Street, in the said county, music seller, of the other part. Whereas the said Lucy Mills Lonsdale has lately transferred into the joint names of herself and the said Robert Edward Lonsdale and Richard Maitland Mills the sum of 1101*l.* 18*s.* 6*d.*, 3*l.* per cent. Reduced Bank Annuities, and the same is now standing in their names in the books of the Governor and Company of the Bank of England, as they the said Lucy Mills Lonsdale, Robert Edward Lonsdale, and Richard Maitland Mills hereby admit and acknowledge. And whereas the said Lucy Mills Lonsdale

is desirous that such trusts should be declared of the said sum of 1101*l.* 18*s.* 6*d.* 3*l.* per cent. Reduced Bank Annuities as are hereinafter contained. Now this indenture witnesseth that, in pursuance of the said desire of the said Lucy Mills Lonsdale, it is hereby declared and agreed by and between the said parties hereto that they the said Lucy Mills Lonsdale, Robert Edward Lonsdale, and Richard Maitland Mills shall stand possessed of and interested in the said sum of 1101*l.* 18*s.* 6*d.*, 3*l.* per cent. Reduced Bank Annuities, and the interest and dividends thereof upon trust, either to permit the said Lucy Mills Lonsdale during her life to receive the said dividends on the said Bank Annuities as the same shall become due and payable, or for the said Robert Edward Lonsdale and Richard Maitland Mills to receive and pay the same to the said Lucy Mills Lonsdale for her own absolute use, and whose receipt for the same, notwithstanding any future coverture, shall be a sufficient discharge to the person or persons paying the same; and, from and after the decease of the said Lucy Mills Lonsdale, they the said Robert Edward Lonsdale and Richard Maitland Mills, or other the trustee or trustees for the time being of these presents, shall stand possessed of and interested in the said sum of 1101*l.* 18*s.* 6*d.* 3*l.* per cent. Reduced Bank Annuities, and the dividends and interest to become due in respect thereof, upon and for such trusts, intents, and purposes as the said Lucy Mills Lonsdale shall, notwithstanding any coverture, by deed, will, or codicil duly executed and attested, give, devise, or appoint, and in default of any such gift, bequest, or appointment, and so far as any such shall not extend, in trust for such person or persons as, under the statutes for the distribution of the effects of intestates, would have become entitled thereto at the decease of the said Lucy Mills Lonsdale, if she had died possessed thereof intestate and without

1863.
PRIDEAUX
v.
LONSDALE.
—
Statement.

1863.

PRIDEAUX

v.

LONSDALE.

Statement.

having been married: such persons, if more than one, to take as tenants in common in the shares in which they would be entitled under the same statutes. And it is hereby declared that, notwithstanding the trusts aforesaid, the said Robert Edward Lonsdale and Richard Maitland Mills, and any trustee or trustees to be appointed in his or their place, on any previous request in writing for that purpose, by her the said Lucy Mills Lonsdale, and, whether she shall be covert or sole, shall join with her in transferring or disposing of all or any part of the said trust premises to such person or persons, in such manner, as she the said Lucy Mills Lonsdale shall, by such requests in writing, direct or appoint. Provided also, and it is hereby declared that, in case of the death of either of them, the said Robert Edward Lonsdale or Richard Maitland Mills, before the trusts hereby reposed in them shall be fully performed, or their or either of them desiring to be discharged from the aforesaid trusts, it shall be lawful for, and the said Lucy Mills Lonsdale is hereby authorized and empowered to nominate and appoint a trustee or trustees to supply the place of them or either of them so declining or becoming incapable to act; and thereupon the trust funds shall be transferred to and vested in such newly-appointed trustees, jointly with the trustees hereby appointed, or in the new trustees solely, as the case may happen. Provided always that the trustee and trustees hereby appointed or to be appointed in manner aforesaid, their heirs, executors, or administrators, shall be answerable for their own respective acts, receipts, and defaults only, and shall be at liberty to retain and allow to each other their reasonable costs and expenses incurred in and about the execution of the trusts hereby reposed in them, and the powers and discretion hereinbefore vested in the trustees herein named shall be exercisable by the trustees or trustee for the time being of these presents. In witness whereof

the said parties to these presents have hereunto set their hands and seals, the day and year first above written.

1863.
PRIDEAUX
v.
LONSDALE.
—
Statement.

[Attested by R. Moulton.]

"LUCY MILLS LONSDALE.

[Attested by Christ. Lonsdale.]

"ROBERT EDWARD LONSDALE.

[Attested by Christ. Lonsdale.]

"RICHARD MAITLAND MILLS (L.S.)"

The bill, as amended, alleged and charged that until the death of his wife the plaintiff was wholly ignorant of the existence of such a settlement, and has not been able to find, and does not believe there ever existed a copy of the settlement, or that his late wife ever was furnished with any. She never made any communication to the plaintiff on the subject, except as to some document she had signed to protect her from her brothers. The said Christopher Lonsdale and Richard Moulton were the executors of Mrs. Child. The bill alleged, that in matters relating to Mrs. Child's will the plaintiff's wife was under the influence of C. Lonsdale and R. Moulton. "That the settlement was wholly prepared by R. Moulton, and engrossed by him." That the obtaining the execution of the settlement was a fraud upon the inchoate marital rights of the plaintiff. That the plaintiff's wife, on the occasion of the execution of the settlement, was without any legal adviser, and was herself wholly inexperienced in business, although R. Moulton then well knew that Mr. Yetts was then generally acting as her solicitor and legal adviser. That the recital in the alleged settlement that the plaintiff's wife had then lately transferred into the names of

1863.
PRIDEAUX
v.
LONSDALE.
—
Statement.

R. E. Lonsdale and R. M. Mills, the sum of 1101*l.* 18*s.* 6*d.*, was and must have been known to be untrue to the defendant R. Moulton, who inserted such recital in the alleged settlement. The stock was part of the sum of 1300*l.* Three per Cent. Reduced Bank Annuities, standing in Mrs. Child's name on her death, and was transferred by her executors, C. Lonsdale and R. Moulton, into the names of the plaintiff's wife and the trustees of the alleged settlement. That such transfer was, under the circumstances, a breach of trust on the part of R. Moulton. That, though the alleged settlement was prepared and engrossed by R. Moulton, and retained by him after its execution, he never communicated its existence to the plaintiff during his wife's life. That the persons who, under the Statutes of Distribution, would have become entitled are her brothers, R. M. Lonsdale, C. Lonsdale, and W. J. Lonsdale.

The plaintiff subsequently consulted his solicitor, who wrote to the defendants R. M. Mills and R. E. Lonsdale on the 14th February, 186 , demanding the delivery up of the settlement and the transfer of the fund, on the ground that the deed was executed without the plaintiff's knowledge or sanction, and in violation of his marital rights, and that he never was made acquainted that there was any instrument to affect his rights until after the death of his wife. In reply to this demand Mr. R. M. Lonsdale wrote as follows:—"As my sister left no children, I feel at present disinclined to waive any right that I may have to any portion of the fund." Mr. C. Lonsdale said, "I do not feel justified in waiving any claim I may have." Mr. J. Lonsdale joined in his brother's determination.

Letters of administration of his wife's estate were subsequently granted to the plaintiff.

The material evidence on behalf of the plaintiff con-

sisted of the affidavit of the plaintiff, which was generally to the effect of the allegations on the bill, and of two affidavits of his solicitor, Mr. Yetts. In the 7th paragraph of his affidavit the plaintiff deposed as follows:—

7. “ That in May, 1859, I in the course of conversation was informed by my intended wife that her money, *i.e.* the legacy, had been invested in the funds, and that she had been to the defendant Moulton, and signed some document the effect of which was, she was informed by Moulton, to prevent her brothers (the defendants) troubling her for money, and her spending it without the intervention of her uncle Mr. C. Lonsdale.’

8. “ I was on terms of intimacy with the defendants, and, not wishing to interfere between my intended wife and her brothers, made no inquiries of her about the matter.”

10. “ In October, 1852, I was requested by my wife to go with her to receive the October dividend on the legacy under Mrs. Child’s will, and she handed me a stock receipt for 1101*l.* 18*s.* 6*d.* Three per Cent. Reduced Annuities. (11.) On attending at the Bank and producing the receipt I for the first time ascertained that the said sum of 1101*l.* 18*s.* 6*d.* Reduced Annuities was standing in the names of my wife and of the above-named defendants R. E. Lonsdale and R. M. Mills, and I immediately told my wife that this mode of investment of her money seemed a bad arrangement, and to which I objected.”

12. “ My wife shortly afterwards told me she had been to Mr. Yetts with a view of getting it altered, and she asked him to make a will for her, giving her stock to her husband, but that Mr. Yetts had told her it was not necessary for her to make such a will, as of course the stock would be her husband’s on her death if he survived her. I knew that Mr. Yetts had been my late wife’s solicitor before her marriage.

13. “ I was satisfied with this explanation, and made

1863.
PRIDEAUX
v.
LONSDALE.
Statement.

1868.
PRIDEAUX
v.
LONSDALE.
Statement.

no further inquiry on the matter, feeling satisfied that my wife's property could not be dealt with without my sanction, and that my interest in it was safe.

14. "On the 17th February, 1860, Mr. C. Lonsdale (one of Mrs. Child's executors) called to pay my wife the balance of her share of the residue under Mrs. Child's will, and gave us two papers, and asked us to sign a joint receipt for the sum of 146*l.* 16*s.* 4*d.*, and on such receipt being signed gave my wife a cheque for that sum. I then stated to Mr. C. Lonsdale that I understood my wife had signed some document, and asked the nature of it. He gave no explanation, and said that R. Moulton had it."

20. "I, until after the death of my late wife, was wholly ignorant of the existence of such settlement, and though I have diligently searched have been unable to find, and I do not believe there ever existed, any copy of such settlement among the papers of my late wife, and I do not believe she was ever furnished with any copy or abstract of the settlement, and she never made any communication to me on the subject of the said stock other than herein mentioned."

21. "C. Lonsdale and R. Moulton, the attesting witnesses to the settlement, were the executors of Mrs. Child, and were trustees for my late wife, and she was under their influence in all matters relating to her interests under the will."

22. "My late wife, on the occasion of the alleged settlement, was without any legal adviser, although, as the defendant Richard Moulton and C. Lonsdale then well knew, Mr. Yetts was then generally acting as her solicitor and legal adviser; and she was herself wholly inexperienced in legal matters."

Mr. Yetts, the plaintiff's solicitor, also deposed that he had acted for the family of Mrs. Prideaux. That in

April, 1859, Mr. C. Lonsdale jocosely observed that her legacy had soon brought Mrs. Prideaux a husband. That on the 19th November, 1859, Mrs. Prideaux called on me, and stated she had to consult me about making her will, as she wished to leave the legacy, which she had derived under Mrs. Child's will, to her husband. I stated to her that a married woman could not make a will; and that on her death, what stock was standing in her name would belong to her husband. These remarks were made under the impression that no settlement had been made prior to her marriage. But, in order to arrive at a safe conclusion upon the subject, I asked her if she had executed a settlement prior to her marriage. To this she answered she had not done so. I then asked her if she had signed any memorandum or other document, when she stated that she had, prior to her marriage, signed some writing or memorandum prepared by Mr. Moulton, the object of which was to protect her money from her brothers. I then said I could not advise her further without seeing this document, and I requested her to borrow it of the said Richard Moulton, and let me see it. This she promised to do, and I was under the impression she left the office for that purpose. The said late plaintiff's wife not having called upon me again as I had expected, in about a week or ten days from the time she was in my office I called on the said Richard Moulton at his said office, and I then mentioned to him that Mrs. Prideaux, the plaintiff's late wife, had requested me to make her will, and he asked me why I did not do so. I said my reason for not doing so was, that a married woman could not make a will; but that she had informed me she had signed some document prepared by him, and which he had, and that it was necessary to see it before I could advise her upon the subject. That I had requested her to call upon him for a loan of the document to let me see

1863.
PRIDEAUX
v.
LONSDALE.
Statement.

1863.
PRIDEAUX
v.
LONSDALE.
—
Statement.

it, and I had not since seen her upon the subject. The only answer he made was that he had not seen her, and he never offered either to produce the document or to give any explanation upon the subject, and that interview terminated.

4. "On the 14th day of February, 1862, I called at the said office of the said Richard Moulton, and asked him who prepared the deed, of which a copy is set out in the 17th paragraph of the bill in this suit, when he said a solicitor prepared it by his direction, and he altered the draft; and that the object of the deed was to prevent the brothers of the plaintiff's late wife getting the money."

Henry Muskett Yetts, a son of the last witness, deposed as follows:—

2. "I well remember Lucy Mills Prideaux, in the pleadings of this cause named, calling at the office of the said Joseph Muskett Yetts on the 19th of November, 1859, and while I was preparing to leave the room, as was usual on such occasions, the said Lucy Mills Prideaux stated in my presence that she had called to consult my father about making her will, as she wished to leave the legacy which she had derived under Mrs. Child's will to her husband. In reply to which I heard my father tell her that a married woman could not make a will, and that it was not necessary for her to do so, as her husband would, of course, be entitled to the stock on her death if he survived her."

Richard Maitland Lonsdale, Charles and William James Lonsdale, three of the defendants, put in a joint and several answer to the amended bill. They denied that the plaintiff had been engaged to be married for eighteen months prior to the marriage, and alleged that the marriage was a surprise to all the friends of the plaintiff's late wife.

They admitted, in the answer to the original bill, that

the settlement had been suggested, engrossed, and prepared by the defendant Moulton, and that the matter was discussed at a meeting between Christopher Lonsdale, Richard Moulton, and the plaintiff's late wife; but that she was not advised by any independent solicitor. The trustees, R. E. Lonsdale and R. M. Mills, by their answer, denied that improper influence was used. They alleged they were unable to say whether the legacy had been in the name or power of the plaintiff's late wife. They alleged they declined to transfer the fund to the plaintiff on account of the conflicting claims.

Richard Moulton, in his answer to the original bill, from his belief, denied that the plaintiff was wholly ignorant of the existence of a settlement. He admitted that the plaintiff's wife never had a copy of the settlement, but alleged she was perfectly acquainted with the powers under it. He denied that he had reason to suppose that the plaintiff's late wife was about to be married, or that the settlement was prepared with reference to such marriage. He admitted that the stock never stood in the name of the plaintiff's late wife alone, and that the settlement was retained by him, and never communicated by him to the plaintiff, or to Mr. Yetts, or to any person on the plaintiff's behalf. In his affidavit, filed on the 16th January, 1863, Mr. Moulton deposed (paragraph 7) that the plaintiff's late wife never, after the execution of the settlement, requested him to show her the deed of settlement, nor ever made any communication to him on the subject.

Paragraph 8 was as follows:—"I say that, to the best of my knowledge and belief, the said Joseph Muskett Yetts did not, as mentioned in the 3rd paragraph of his affidavit, call at my office, nor mention to me that the plaintiff's late wife had requested him to make her will; nor did I ask the said J. M. Yetts why he had not done

1863.
PRIDEAUX
v.
LONSDALE,
—
Statement.

1863.
PRIDEAUX
v.
LONSDALE.
Statement.

so ; nor did he inform me that his reason for not doing so was, that a married woman could not make a will ; nor that she had informed him she had signed some document prepared by me. Nor did J. M. Yetts say it was necessary to see it before he could advise her on the subject. Nor did he say that he had been requested by the plaintiff's late wife to call on me for a loan of the document, to let him see it ; nor that he had not since seen her on the subject. Nor did I reply that I had not seen the plaintiff's late wife ; nor did the said Yetts, at any time, ask me to produce the document, or ask me for any explanation on the subject. For I say that, if the said Yetts had done so, as he was then acting occasionally as my solicitor, and as the solicitor of Mr. C. Lonsdale, I should not have hesitated to let him see the said document."

Argument.

Mr. Bacon and Mr. Batten, for the plaintiff.

There are two grounds on which this settlement ought to be set aside.

First, because when Mrs. Prideaux executed it she was neither properly advised, nor made aware of the effect of her act, which was a most improvident one. Secondly, because it was a fraud on the marital right of the plaintiff.

On the first point it was clear, from the evidence, that Mrs. Prideaux had not had proper advice, although the trustees of Mrs. Child's will well knew that Mr. Yetts was her solicitor. She executed the settlement at the bidding of Christopher Lonsdale and Moulton. It was equally clear she was not aware of the effect of her act, as she informed her husband that the fund would become his by survivorship. It was proved she had never had a copy of the settlement. These grounds were sufficient in this Court to invalidate any deed, and a marriage settlement was no exception to the rule.

On the second ground, also, of fraud on the marital right, the settlement ought to be set aside. The treaty of marriage was pending at the date of the deed. It was admitted that no copy of the settlement had ever been supplied to the plaintiff or his wife; and it was proved that all the husband was told was that some document had been executed, which did not affect his or his wife's right. On all the cases this was enough to invalidate the settlement.

1863.
PRIDEAUX
".
LONSDALE.
—
Argument.

In the *Countess of Strathmore v. Bowes* (a), Lord Eldon intimated that there might be a fraud on the marital right, though he thought in that particular case, though there was concealment, there was no fraud. "The husband must not be cheated" (b). In *Goddard v. Snow* (c), a woman, ten months before her marriage, but after the commencement of that intimate acquaintance with her future husband which ended in marriage, made a settlement of a sum of money, which he did not know her to be possessed of. The marriage took place, she concealing from him both her right to the money and the existence of the settlement. Ten years afterwards she died, and after her death he filed a bill to have the money paid to him, and the Court held the settlement void as a fraud on his marital right. In *Taylor v. Fugh* (d), it was laid down that it was not necessary, in order to establish his right, to impeach a settlement that the husband should prove actual fraud or deception, for deception will be inferred if, after the commencement of the treaty for marriage, the wife should have attempted to dispose of her property without the knowledge or concurrence of her intended husband.

In this case there was also this further circumstance, that the deed recited that Mrs. Prideaux had transferred

(a) 1 Ves. jun. 22.

(c) 1 Russ. 485.

(b) Ibid. p. 27.

(d) 1 Hare, 608.

1863.
 PRIDEAUX
 v.
 LONSDALE.
 —
Argument.

the fund to the trustees, whereas she never had dominion over the fund at all. In *Lewellin v. Cobbold (a)*, the Court had held that the falsehood of the recitals in a settlement on a material point was sufficient to invalidate the deed.

[*Burnham v. Bennett (b)* was also cited].

It would be contended that there had been acquiescence on the part of the plaintiff, but it had been proved that the plaintiff had not such knowledge of the circumstances as that he could be held to have acquiesced. It was submitted that on these grounds the settlement ought to be set aside.

Mr. *Malins* and Mr. *Fooks* for the next of kin of the plaintiff's wife, who were entitled to the funds under the settlement.

This bill must be dismissed; first, because the plaintiff had not shown that the wife executed this settlement in contemplation of marriage, and without the knowledge of the plaintiff; and secondly, on the ground of the husband's acquiescence.

On the first point, the case of *Goddard v. Snow (c)*, cited by the plaintiff's counsel, showed that there must be concealment, which was not even pretended here. That the husband knew that some document had been executed was not disputed.

In *Maber v. Hobbs (d)*, which much resembles this case, a single woman transferred stock into the joint names of herself and two trustees; and on the day of the transfer she and the trustees, without reference to marriage, executed a settlement, declaring the trusts, i.e., to pay the dividends to herself for life for her separate

(a) 1 S. & G. 376.

(b) 2 Coll. 254.

On the subject of settlements

see *Sloccombe v. Glubb*, 2 B. C. C.

545, and *Durnford v. Lane*, 1 B. C. C. 106.

(c) 1 Russ. 485.

(d) 2 Y. & C. (Ex.) 317.

1803.
 PRIDEAUX
 v.
 LONSDALE.
 Argument.

use, independently of any husband she might marry, and after her death on such trusts as she, notwithstanding her coverture, should by deed or will appoint. And in default for her, her executors, administrators, and assigns. She afterwards married, and by a deed reciting the settlement and executed by her and her husband, assigned the fund, and it was held, though under the settlement she might not have had power to make the assignment, it was valid.

In *England v. Downs (a)*, it was held that, though wilful concealment from the husband would entitle him to relief, yet there might be concealment, or rather non-communication, "which was no fraud on the marital right." That was the most that could be pretended in this case.

In *St. George v. Wake (b)*, where a lady, pending a treaty of marriage, which afterwards took effect, made a voluntary assignment of part of her property to her sister, it was held that the husband, who was, under the circumstances presumed to have had notice of the assignment before his marriage, was not entitled to set it aside on the ground of fraud on his marital rights.

(*Soader v. Clark (c)*, was also cited.)

They also contended that there had been acquiescence. Under these circumstances it was submitted that the plaintiff was not entitled to the relief asked, and the bill ought to be dismissed with costs.

Mr. Southgate and Mr. Cracknall for Moulton.

This was not a bill against trustees for a breach of trust, inasmuch as such a bill must seek relief against both trustees. Then, how could it be sustained against Moulton? He was in that view a mere agent, and not

(a) 2 Beav. 522. (b) 1 M. & K. 610. (c) 2 M. & G. 382.

1863.
 PRIDEAUX
 v.
 LONSDALE.
 Argument.

liable as such. *Le Texier v. The Margravine of Anspach* (a); *Marshall v. Sladden* (b).

[*Reynell v. Sprye* (c), and *Small v. Attwood* (d), were also cited.]

On the question how far the settlement was valid against the husband, the case made by the bill failed. The settlement was not in contemplation of marriage, for the intended marriage was unknown to Moulton. With respect to the recital, as the property was stock it would have been absurd to have transferred the fund to the legatee in order to be again retransferred by her to the trustees. The common form had been used.

[The VICE-CHANCELLOR.—What evidence is there to show she intended making a gift of her property to her next of kin?]

She was told by Moulton, if she wished her husband to have it she must make a settlement.

The true test was this, could she herself come to set the deed aside? Certainly not; even if she did not in the first instance fully understand the settlement, she clearly adopted it. She had possession of the stock receipt; she received the residue, and she and her husband gave a joint receipt for the balance. It was too late now for the husband, after having acquiesced in the settlement, to seek to set it aside.

Mr. Bacon was heard in reply.

His Honour reserved judgment.

Judgment. The VICE-CHANCELLOR :—

The plaintiff seeks by this suit to set aside a settlement made by his late wife after her engagement to marry him.

(a) 15 Ves. 159.

(b) 7 Hare, 428, 442.

(c) 1 De G. M. & G. 656.

(d) 6 Clk. & Fin. 352.

He was not a party to the settlement, and he asks relief on the ground that it has defrauded him of her personal property, to which, by his marital right, he was entitled.

It has been argued that, because the husband was told before the marriage that the lady had executed some instrument affecting the property in question, he was bound to inquire into the nature of the instrument, and is, therefore, fastened with a notice of its contents, and is bound by acquiescence, so as to have lost any right to set it aside. It is, however, impossible to apply the doctrine of constructive notice to a case of this kind. The information which the plaintiff received as to the nature and effect of the instrument was incorrect. Suppression of the truth or misrepresentation of a material fact will vitiate any contract or gift the validity of which depends upon the truth and accuracy of the representations on which it was made. Acquiescence, without full and sufficient knowledge and understanding of the real nature and effect of the instrument, can be of no avail.

It appears from the evidence that the plaintiff did not know or understand the real nature and effect of the instrument at any time before the death of his wife; and it also appears that the wife herself never perfectly understood the effect of that ultimate trust which deprived the plaintiff of his marital right. Nor is there anything to shew that the persons who under that ultimate trust now claim to be entitled to the property, were understood or intended by her to be objects of her bounty, to the exclusion of the rights of her husband. This ultimate trust could not have prevailed against children of the marriage, and it is not easy to see how the fact that there has been no child of the marriage can make such a trust in favour of mere volunteers valid against the surviving husband. There must be a decree declaring that the settlement is invalid, and ought to be delivered up to be

1863
PRIDEAUX
v.
LONSDALE.
Judgment.

1863.

PRIDHAUX

v.

LONSDALE.

Judgment.

cancelled, and that the defendant pay to the plaintiff the costs of the suit.

As to the defendant Moulton, it has been argued that he is improperly made a defendant, and that the plaintiff is not entitled to any relief against him. It is true that he is not named as a party to the deed which has intercepted the marital right; but the property of which the plaintiff is deprived by the deed was a legacy under a will, of which the defendant Moulton was the executor. He was the adviser and framer of the deed. The recital of the transfer of this legacy by the plaintiff's wife into the names of the trustees of the deed, is not a true and accurate recital. He framed the ultimate trust which has excluded the marital right of the plaintiff, and is a voluntary trust in favour of persons whom neither the wife herself nor the plaintiff knew to be an object of her bounty. Knowing the real nature of the deed, and not having any right to the custody of it, he kept it in his own repositories, and never communicated its nature or contents to the plaintiff, whose rights were so materially affected by it. It appears that he never informed the plaintiff's wife, whom he procured to execute this ultimate voluntary trust, of its real nature and effect. Throughout the whole transaction he was more an actor than an agent. His conduct has been mainly the occasion of this litigation, and, under these circumstances, the plaintiff is entitled to a decree against him and the other defendants for payment of the costs of the suit.

Re SAUNDERS'S ESTATE.
SAUNDERS *v.* WATSON.

1863.
Jan. 16th.

ALFRED SAUNDERS, in November and December, 1860, committed acts of embezzlement by misappropriating certain monies belonging to the Corporation of Melbourne.

A voluntary settlement of personal estate, executed in favour of a wife and children, after commission of a felony, but before and in fear of conviction—*Held invalid against the Crown.*

By an indenture dated the 23rd May, 1861, between Alfred Saunders of the one part, and John Browning and William Jones of the other part, A. Saunders assigned to the said Browning and Jones all his share and interest under the will of his father, upon trust, immediately on the receipt of the same, to invest it in Government or real securities in Victoria, and to pay the interest, dividends, and annual proceeds thereof to his wife for the term of her natural life, and, from and after her decease, to divide the same among his children absolutely.

At the date of the deed A. Saunders was resident at Melbourne. His father died in 1860.

On the 8th June, 1861, Alfred Saunders was arrested on a charge of embezzlement, which, by the law in force in Melbourne, is a felony. On the 21st June, 1861, he was convicted, and sentenced to a term of imprisonment.

A bill had been filed to administer the estate of the settlor's father, and A. Saunders's share had been carried to his separate account, or to the account of the parties entitled. A petition was now presented in the cause by the trustees for payment of that share. The petition contained the following allegation:—

“Prior to his conviction and apprehension, the said A. Saunders offered and proposed to the Corporation of Melbourne, who subsequently arrested and prosecuted

1863.
Re
 SAUNDERS'S
 ESTATE.
 SAUNDERS
 v.
 WATSON.
 —
Argument.

him, that, upon receiving the money coming to him in this suit, he would pay and make good the monies which had been used or appropriated by him belonging to the Corporation."

Mr. *Greene* and Mr. *Talfourd Salter* now appeared for the petitioner, and asked for payment to them of the fund.

Mr. *Wickens*.—An assignment by a person charged with felony, and subsequently convicted, is void as against the Crown: *Morewood v. Wilkes* (a). In this case it was clear that the settlement was made in contemplation of conviction, and was therefore void.

Judgment.
 —

The VICE-CHANCELLOR:—

The question is whether the settlement of the 23rd May was executed in order, to defeat the right of the Crown to the personal property of the felon. If the date mentioned in the indictment is correct, the act of felony was committed before the execution of the deed. It has been argued that the date in the indictment was immaterial, and that the prisoner might be convicted on any act committed before the trial. It may be in a sense immaterial; but only in the sense that it might have been shown to be false by those who allege that it is so. I think the date mentioned in the indictment must be *prima facie* evidence of the true date of the act. The petition moreover states an offer to pay the money, which must have been made before the settlement. I assume, therefore, that the acts committed were before the date of the settlement; and if the deed was executed in apprehension of a conviction it was clearly fraudulent. The petition must be dismissed, so far as it seeks payment of

(a) Car. & P. 144.

the fund in court to the trustees of the settlement of May, 1861, and it must be declared that that settlement is invalid. The costs of all parties to come out of the fund in court, and the balance to be transferred to the Solicitor of the Treasury and the Assistant Paymaster for the time being.

1863.
—
Re
SAUNDERS'
ESTATE.
SAUNDERS
v.
WATSON.
—
Judgment.

ENO v. TATHAM.

January 19.

THIS was a suit by the infant son of the testator against the testator's widow, his executrix and residuary legatee, and her second husband, for the administration of his, the testator's, estate, and praying also that it might be declared as between the infant and the testator's widow, that the personal estate was primarily liable to the payment of a mortgage debt for 1700*l.* and interest, and that the personal estate might be applied in payment of such mortgage debt.

The testator, Hildred Eno, by his will, dated the 11th November, 1857, having appointed his wife, Harriet Eno, his executrix, and William and Isaac Sykes to be his trustees, made the following disposition as to his personal estate:—

“ I give my household goods, live and dead stock, and other my personal estate and effects whatsoever and wheresoever, unto my wife absolutely, subject to the payment of my debts, funeral and testamentary expenses.”

The testator then devised all his real estates to the said William and Isaac Sykes, upon trust to let the same, from year to year, or for any term not exceeding seven years,

A bequest of all testator's personal estate to his executrix, subject to the payment of his just debts and funeral and testamentary expenses, was held, on the construction of the Act 17 & 18 Vic. c. 113, a sufficient manifestation of an intention that a real estate was not to be primarily liable to a mortgage debt.
Woolsten-croft v. Woolsten-croft distinguished.

1863.
 ENO
 v.
 TATHAM.
 —
Statement.

provided his wife should so long live, and upon trust to stand possessed of the rents and profits thereof, in trust for his wife for life; and from and after her decease, upon trust to sell the same, and to stand possessed of the monies arising from such sale, for the benefit of his brothers and sisters, nephews and nieces.

By a codicil to his will dated the 6th May, 1859, the testator, after reciting that his wife, since the making of his will, had borne him a son, declared that all his real estates, from and after the decease of his said wife, should be held by his trustees upon trust, in the events which had happened, for his said son and only child, the plaintiff, Hildred Allis Eno, absolutely.

The testator died on the 2nd September, 1859, without altering his will and codicil. William and Isaac Sykes, the trustees named in the will, disclaimed the trusts; no other trustees had been appointed.

At the date of his decease the testator was seized in fee simple of certain real estate at Stickney, in Lincolnshire, which he had mortgaged for 1700*l.*, which mortgage was still subsisting.

In January, 1860, Harriet Eno, the testator's widow and executrix, married the defendant William Tatham.

Under an order of the Court Mrs. Tatham appeared separately from her husband.

Argument.
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Mr. Schomberg for the plaintiff.—But for the dictum of Lord Campbell in *Woolstencroft v. Woolstencroft* (a) the question suggested on this will could not have arisen. The statute 17 & 18 Vic., c. 113, merely enacts that in order to relieve the real estate from mortgage debts, which the rule of law made payable out of the personalty, there must be an intention shown that the land should not bear such charge. This was the “contrary intention”

(a) 2 De G. J. & F. 347.

mentioned in the act. In this case the testator bequeathed all his personal estate to his executrix, subject to the payment of his just debts. Was not this, then, an intention that his debts were to be paid out of the personal estate?

But Lord Campbell said (a), "the same rule should now be observed with respect to exempting the mortgaged land from the payment of the mortgage money as was before observed with respect to exempting the personal estate, the mortgaged land being now primarily liable, as the personal estate had been liable previously." The old rule to which Lord Campbell referred was, that in order to exonerate real and personal estate there must be in the will not only an intention to charge the real estate with the debts, but to exonerate the personal estate from those debts.

But, first, this was a mere dictum not necessary for the decision of the case which the Lord Chancellor decided, on the ground that under the will the executor had the power of selling a competent part of the real estate for the payment of debts. But, secondly, the Act of Parliament required no such language in the will as that suggested by Lord Campbell. All the Act required was a contrary intention, however manifested, and, therefore, to adopt the view contained in the Lord Chancellor's dictum would be to introduce something not required by the Act.

In *Mellish v. Vallins* (b) Vice-Chancellor Wood declined to act on Lord Campbell's dictum, and that case was identical with this, except that in that will the testator used the words *all* his just debts.

It was submitted, therefore, that here the contrary intention was sufficiently shown.

[*Willson v. Newman* (c), before the Master of the Rolls, was also cited.]

(a) *Ibid.* 350.

(b) 2 J. & H. 194.

(c) 31 Beav. 33.

1863.
—
ENO
v.
TATHAM.
—
Argument.

1863.

ENO

v.

TATHAM.

Argument

Mr. *Martindale*, for Mrs. Tatham, cited *Smith v. Smith* (a).

Mr. *Bacon* and Mr. *Bedwell* for Mr. Tatham.

This case was not distinguishable from *Woolstencroft v. Woolstencroft* (b), in which the Court of Appeal has expressly decided that nearly the same words were not sufficient to indicate the contrary intention specified in the Act, in order to exonerate the real estate. In that case the gift was of all his personal estate to his executrix, whom he directed to pay all his debts out of his estate. Here there was a gift of all his personal estate to his executrix, subject to the payment of all his debts. The meaning of both wills was substantially the same. If the mere bequest of personalty subject to payment of debts were a sufficient indication of intention, the Act would become inoperative. In *Woolstencroft v. Woolstencroft* Lord Campbell said that the rule of law introduced by the statute, as to personal estate, was the same that previously prevailed as to real estate; but if so, it was clear that the language was insufficient to exonerate the real estate.

Judgment

The VICE-CHANCELLOR:—

The difficulty in this case seems to me to turn upon those particular words of the Act which say that the “expression of any contrary or other intention” shall be sufficient to show that the personal estate is primarily liable. I have already (c) stated my impression as to what Lord Campbell is reported to have said in the case of *Woolstencroft v. Woolstencroft*. My impression certainly is that Lord Campbell had not clearly in his mind what the rule was which was established by the case of *Bootle v. Blundell* (d), and by other

(a) 3 Giff. 263.

(b) 2 De G. F. & J. 351.

(c) 3 Giff. 275.

(d) 19 Ves. 518; s. c. 1 Mer.

193, 216.

cases, as to the exoneration of the personal estate from the payment of debts. I do not think that anybody can say that, according to the law as settled by the case of *Boothe v. Bhundell*, the expression of "any other or contrary intention" would exonerate the personal estate. That is not the law of the Court.

In the present case there is a gift to the wife of the household goods, and of all the personal estate subject to the payment of debts. In the case before the Vice-Chancellor Wood, which resembles this, except in the transposition of the clauses, the direction extends to the payment of "all" debts. In the present case the direction is "subject to the payment of my debts." But I do not think anything can turn upon that small difference, because, when a testator says "subject to my debts," he means "subject to all my debts." What the testator has given here is, what remains of his personal estate after all his debts are paid; and I cannot come to any other conclusion upon the true construction of the gift of the personal estate to this lady, than that what she is entitled to is what remains of the personal estate after the payment of all the testator's debts, funeral and testamentary expenses. If she is to take the personal estate subject to the payment of all debts, this mortgage debt is one of the debts, and I can find no ground for construing this gift so to except this mortgage debt. The Vice Chancellor Wood, in the case of *Mellish v. Vallins*, made this important observation—that one of the arguments relied upon to induce the Legislature to pass the Act called "Mr. Locke King's Act" was the rule of construction of this Court, that, if a testator gives an estate subject to a mortgage, unless he signifies a contrary or other intention that was not sufficient to exonerate the personal estate. Every one must see that such a construction was a remarkably strong one to be arrived at by these Courts; but that construction was upheld by the

1863.
 —————
 ENO
 v.
 TATHAM.
 —————
Judgment.

1863.
ENO
v.
TATHAM.
—
Judgment.

weight of authority. Lord Campbell's view of the construction of the Act seems to me to go this length—that, if a testator says, "I give all my personal estate to my wife, subject to the payment thereof of all my debts," still the personal estate is not liable to the payment of a mortgage debt. I can come to no other conclusion upon this Act of Parliament than that the words "any contrary or other intention" must have their proper meaning; and if I find the expression of some intention contrary to the mortgage being a burden upon the mortgaged estate, I am bound by the language of the Act. This lady must take the personal estate, subject to the payment of the debts, and she is not entitled to take anything until she has paid the mortgage debt, which is, therefore, not primarily payable out of the estate upon which it was charged.

SWAINSTON v. CLAY.

1863.

Jan. 23 & 24.

THE bill stated that in and previously to October, 1860, Messrs. Brown & Briggs carried on business at Pallion, near Sunderland, as shipbuilders, and continued to do so, in partnership, until their bankruptcy on the 2nd June, 1862. In October, 1860, Messrs. Brown & Briggs first became connected in business with the plaintiff, and before the end of that year became indebted to him in a large amount for copper sheathing supplied to them for the purposes of their business. In March, 1861, Mr. Fisher, of Barrow, in the county of Lancaster, shipowner, applied to the plaintiff to obtain a contract with some builder for building a ship, and the plaintiff accordingly entered into negotiations with Messrs. Brown & Briggs for that purpose, which resulted in an agreement in writing dated the 11th April, 1862, between Messrs. Brown & Briggs of the first part, and James Fisher of the other. The agreement was signed by the parties. By such agreement Brown & Briggs agreed to build and sell, and James Fisher agreed to buy, a new schooner, to be built in the yard of Messrs. Brown & Briggs, of the dimensions specified therein.

Where the plaintiff advanced monies on a vessel in process of construction on an agreement that the vessel was to be assigned to him (which was done), and that such advance was to be a charge on the vessel—*Held*, that on the bankruptcy of the ship-builder, while they were building the vessel, she was not in the order and disposition of the bankrupts, and that the plaintiff's lien for the monies advanced was not destroyed by the bankruptcy.

Notwithstanding the agreement was not signed till the 11th April, 1862, Messrs. Brown & Briggs in fact commenced the building of the vessel while the negotiations for the agreement were pending. Messrs. Brown & Briggs, being unable to proceed with the said vessel for want of funds, applied to Mr. Fisher, before the date of the agreement, to make them an advance, but unsuccessfully. They then applied to the plaintiff, who lent them 400*l*., on the understanding that the repayment of the same, with interest, to be secured as well by an assign-

1863.
SWAINSTON
v.
CLAY.
—
Statement.

ment of the said agreement, as soon as the same should be duly signed and perfected, as by a lien or charge upon the vessel itself.

The whole of the said sum of 400*L.* was expended on the vessel before the date of the indenture of the 12th day of April, 1862, which was in the following terms:—

By an indenture dated the 12th day of April, 1862, and made between the said Messrs. Brown & Briggs of the one part, and the plaintiff of the other part (and which indenture was duly executed by the parties): After reciting the said agreement of the 11th of April, 1862, and that the said Messrs. Brown & Briggs had, in order to enable them to proceed with the building of the said vessel mentioned and referred to in the hereinbefore-stated agreement, and for their other necessities, applied to and requested the plaintiff to advance and lend them the sum of 500*L.*, which he had agreed to, upon having the repayment thereof, as well as of all other sums which the plaintiff, his executors, administrators, or assigns might thereafter advance and pay to, or for the use, or on account of the said Messrs. Brown & Briggs, their executors or administrators, or which might thereafter be due and owing by the said Messrs. Brown & Briggs, their executors or administrators, to the plaintiff, his executors, administrators, or assigns, upon any account whatsoever, secured in manner in the said now stating indenture appearing: And it was by the now stating indenture witnessed, that in pursuance of the said agreement, and in consideration of the sum of 500*L.*, on or immediately before the execution of the now stating indenture paid by the plaintiff to the said Messrs. Brown & Briggs, and for the purpose of securing the repayment, with interest, of the same sum, and such sum or sums (if any) not exceeding the amount by the said now stating indenture limited, as might thereafter be advanced by the plaintiff to or for the use of, or as might become payable

to the plaintiff, his executors, administrators, or assigns, by the said Messrs. Brown & Briggs: They the said Messrs. Brown & Briggs, by the now stating indenture, assigned unto the plaintiff, his executors, administrators, or assigns all that the hereinbefore stated memorandum of agreement or contract for building a vessel of the 11th day of April then instant, and all the estate, right, and interest of them the said Messrs. Brown & Briggs respectively, of and in the same, and all benefit and advantage thereof, together with full power and authority for the plaintiff, his executors, administrators, and assigns, to demand, sue for, recover and receive, and give effectual receipts and discharges for the monies therein, and in the now stating indenture mentioned, and to become payable by virtue thereof, to hold the said premises unto the plaintiff, his executors, administrators, and assigns as security to him and them for the repayment as well as of the said sum of 500*l.* so advanced as aforesaid, as of all such further sum and sums of money (if any) not exceeding the sum thereafter limited, as the plaintiff, his executors, administrators, or assigns, might thereafter advance to, or as might become due and payable by, the said Messrs. Brown & Briggs to the plaintiff, his executors, administrators, or assigns, upon any account whatsoever, together with interest on all such sum and sums respectively from the times of their respectively becoming due, at and after the rate of 5*l.* per centum per annum. And it was by the said now stating indenture agreed and declared, for the purpose of better securing the plaintiff the repayment of all such sum and sums and interest as aforesaid, that, subject to the lien mentioned and given in and by the said recited agreement, the said vessel, and the outfit thereof, and all materials, stores, goods, and chattels then being, or which might from time to time, or at any time during the continuance of that security might be, upon the said building-yard, should be and be-

1803.
 SWAINSTON
 v.
 CLAY.
 —
Statement.

1863.
SWAINSTON
v.
CLAY.
—
Statement.

come, and should be deemed and taken to be for all intents and purposes whatsoever, the absolute property of the plaintiff, his executors, administrators, or assigns, to be held by him or them in lien to the extent of all such sums as might from time to time, or at any time during the continuance of the now stating security should be due from the said Messrs. Brown & Briggs, their executors or administrators, to the plaintiff, his executors, administrators, or assigns, with interest as aforesaid. Provided always, and it was by the now stating indenture agreed and declared by and between the said parties thereto, that the aggregate amount of principal monies to be secured by virtue thereof should not exceed 600*l*.

Notwithstanding the said sum of 500*l*. expressed to be received by the said indenture of the 12th of April, 1862, was therein stated to have been paid at or immediately before the execution of the indenture, 400*l*., part thereof, was in fact paid by the plaintiff to Messrs. Brown & Briggs; and the sum of 100*l*., residue thereof, was all that was really paid at the time of the execution of the said indenture, which was laid out on the vessel. Shortly after the date of the indenture of the 12th April, 1862, differences arose between Mr. Fisher and Messrs. Brown & Briggs, as to the terms of the agreement of the 11th April, 1862 (the assignment), and on the 19th of May it was cancelled and put an end to. At the time of such cancellation there was due to the plaintiff on the security of the indenture of the 12th April, 1862, 300*l*., and Messrs. Brown & Briggs, for the express purpose, of further and more effectually securing the plaintiff against loss by reason of the agreement being so cancelled as proposed, and, indeed, strongly urged that the plaintiff should become the absolute owner of the vessel; and to such proposal the plaintiff, believing that he would not thereby lose the benefit of his security of the 12th April, 1862, consented.

By a memorandum dated the 20th May, 1862, between Messrs. Brown & Briggs of the one part, and the plaintiff of the other part, and duly signed by the said parties, it was agreed as follows:—

1863.
SWAINSTON
v.
CLAY.
Statement.

“The said Messrs. Brown & Briggs agree to sell, and the plaintiff agrees to purchase, the hull of a new schooner or vessel now in course of building by Messrs. Brown & Briggs at their yard at Pallion, to be built and completed fully in accordance with the specification thereto annexed, for the price of 1150*l.*, payable as herein mentioned.

“That the sum of 500*l.*, already advanced and paid by the plaintiff to Messrs. Brown & Briggs at their request, which was secured to be repaid to the plaintiff by a charge or security of the vessel, shall be deemed and taken as part payment of the purchase-money for the said vessel.

“That in case Messrs. Brown & Briggs shall not complete and launch the said vessel by the 21st June then next, or if they shall at any time before the said vessel should be finished cease working at the said vessel, it shall be lawful for the plaintiff, his agents, servants, and workmen, to enter into and upon the said building yard, and to complete the said vessel, using the materials, stores, and tools of Messrs. Brown & Briggs for that purpose; and all costs thereby incurred shall be paid by and be recoverable against Messrs. Brown & Briggs.”

Messrs. Brown & Briggs made no further progress with the vessel, and on the 2nd June, 1862, were adjudicated bankrupts. On the 19th June following the defendants were duly elected creditor's assignees of the bankrupts, and such election was duly confirmed by the Court of Bankruptcy for the district of Newcastle-on-Tyne. Shortly after the bankruptcy the plaintiff applied to the defendants and requested them to complete the

1863.
 SWAINSTON
 v.
 CLAY.
 —
Statement.

vessel according to the terms of the agreement of the 20th of May, 1862, or else to authorize the plaintiff himself to enter the shipbuilding-yard of Messrs. Brown & Briggs and complete the same; but the defendants neither completed the vessel nor would they allow the plaintiff to do so.

The bill alleged that the defendants contended that the cancellation of the agreement of the 11th April, 1862, determined or vitiated the plaintiff's security of the 12th April, 1862, and the lien in his favour thereby created; and that they also insisted that he had no rights as against them under the said agreement of the 20th May, 1862, and in fact that he had no interest whatever in the said vessel further than as a general creditor of the bankrupts.

The bill charged that the agreement of the 12th April, 1862, created a valid lien or charge upon the said vessel in plaintiff's favour for the sum of 500*l.* and interest, and any further sum not exceeding together the sum of 600*l.*, and that the subsequent dealings between him and the bankrupts in no way prejudiced or otherwise affected such lien or charge, insomuch as the possession of the said vessel by the bankrupts, and subsequently by their assignees, the "defendants," must, as against the said bankrupt's estate, be treated as the possession of the plaintiff himself; but in case the plaintiff shall be held not entitled to any such lien or charge as aforesaid, then he is advised and submits that he is entitled to have the said agreement of the 20th of May, 1862, specifically performed, he being in that event willing to complete the said vessel himself in case the defendants persist in refusing to do so,

The plaintiff prayed as follows:—

1. That an account may be taken of what is properly due to the plaintiff by virtue of the said indenture of the 12th of April, 1862, and the lien or charge thereby

created, or otherwise in respect of the advances so made by the plaintiff as aforesaid.

2. That the plaintiff may be declared entitled to a lien or charge on the said vessel, for what on taking such account shall be so found due to the plaintiff.

3. That if the plaintiff shall be held not entitled to such lien or charge as aforesaid, then that the defendants may be decreed specifically to perform the said agreement of the 20th of May, 1862, either by themselves completing or allowing the plaintiff to complete the said vessel according to the terms of the said agreement, and by doing all necessary acts for conferring upon the plaintiff an absolute interest in the said vessel, and completing his title thereto, the plaintiff being ready and hereby offering to complete the said agreement on his part.

The bill was filed on the 13th October, and on the 17th November the plaintiff moved for an injunction to restrain the defendants from selling the vessel; but on the defendants undertaking to file their answer within fourteen days, and in the meanwhile undertaking not to mortgage or otherwise deal with the vessel so as to prejudice the plaintiff's rights, the motion was ordered to stand till the hearing.

On the 1st December the assignees filed their answer, alleging that the deed of the 12th April, 1862, was never registered as a bill of sale. They alleged that the agreement of the 20th May was signed at a time when the bankrupts were hopelessly insolvent, and was a fraudulent preference, and therefore void.

The answer further alleged, "that when the contract for building the said vessel was arranged with the plaintiff, he agreed that, if the bankrupts required funds to enable them to build the vessel, he would make an advance out of his own moneys for that purpose. The answer then proceeded thus, "We believe it to be

1863.
SWAINSTON
v.
CLAY.
Statement.

1863.
 SWAINSTON
 v.
 CLAY.
 Statement.

the fact that the plaintiff did, on or about the 28th March, 1862, advance and lend to the bankrupts the said sum of 400*l.*, and that, on or about the 4th day of April, 1862, he advanced and lent to them the further sum of 100*l.*" But whether the said sum of 400*l.* was so advanced and lent upon the understanding that the repayment of the same was to be secured as well by an assignment of the said agreement, or whether or not as soon as the same should be duly signed and perfected, or at any other time, as by a lien or charge upon the said vessel itself, or upon any other understanding, such sum was advanced, or upon what other security, we are unable to state, as to our belief or otherwise."

The defendants further alleged that the cancellation of the 11th April put an end to the plaintiff's lien, if it had previously existed.

It appeared from the evidence that on the 20th May, 1862, Messrs. Brown & Briggs granted a certificate of the tonnage, title, and build, &c., of the vessel, under the 40th section of the Merchant Shipping Act, 17 & 18 Vic. c. 104.

Argument.

Mr. Bacon and Mr. Waller for the plaintiff.

It could not be disputed that, by the deed of the 12th April, 1862, the plaintiff acquired a valid lien on the vessel for the sum of 500*l.*, with interest, and for any further sum, not exceeding the sum of 600*l.*, which he might advance. Nothing that took place subsequently could affect his right; but even if it had, the plaintiff's title under the deed of the 20th May was indefeasible. By that deed he became the purchaser, and, as purchaser, paid 500*l.* on account. That the vessel remaining in the yard of the bankrupt did not render her, in law, in the order and disposition of the bankrupts was clear: *Holder-ness v. Rankin* (a). Here there was a contract part

performed, which the plaintiff was entitled to have specifically performed by the assignees.

In *Woods v. Russel* (a), where a shipbuilder contracted to build a vessel for the plaintiff, who paid several instalments of the price, it was held that the signature, by the builder, of the building certificate was sufficient to vest the general property in the purchaser from the date of the registration: *Ex parte Watts*. [*Re Attwater, Bart.*, December 12th, 1862, before the Lord Chancellor in Bankruptcy, was also cited.]

1863.
SWAINSTON
v.
CLAY.
Argument.

Mr. Malins and Mr. T. Stevens for the assignees.

The deeds of the 11th and 12th April, 1862, ceased to have any operation. [The VICE-CHANCELLOR.—Then does the deed of the 20th May confer any title on the the plaintiff?] It was not a purchase, as the plaintiff alleged; it was a mere security for money lent. The vessel could not be registered, and therefore the money was lent on the security of a chattel, and ought to have been registered under the Bills of Sale Act, 17 & 18 Vic. c. 36; and not having been so registered the security became void.

The fallacy in the reasoning on behalf of the plaintiff was that the deed of the 20th May, 1862, was not a *bonâ fide* purchase.

But, secondly, the deed was void as a fraudulent preference.

Mr. Bacon, in reply.—The 17 & 18 Vic. c. 36, did not apply to ships, which were expressly excepted by the 7th section.

The VICE-CHANCELLOR:—

The question is whether the plaintiff has a lien or charge upon this incomplete vessel in respect of moneys

Judgment.

1863.
SWAINSTON
v.
CLAY.
—
Judgment.

advanced by him to the bankrupts. If these advances were made by him upon an understanding that he was to have a charge upon the vessel in respect of them, there seems no ground upon which the defendants can resist the claim. The answer of the defendants states, as to these advances, in the 4th paragraph, that, "when the terms of the said contract for building the said vessel were arranged with the plaintiff, he agreed that, if the bankrupts required funds to enable them to build the vessel, he would make them an advance out of his own moneys for that purpose; and we believe it to be the fact that the plaintiff did, on or about the 28th March, 1862, advance and lend to the said bankrupts the said sum of 400*l*., and that, on or about the 4th day of April, 1862, he advanced and lent to them the further sum of 100*l*." Then, as to the understanding upon which the 400*l*. was advanced, they say: "But whether the said sum of 400*l*. was so advanced and lent upon the understanding that the repayment of the same, with interest, was to be secured as well by an assignment of the said agreement, or whether or not as soon as the same should be duly signed and perfected, or at any other time, as by a lien or charge upon the said vessel itself, or upon what other understanding such sum was advanced, or upon what other security, we are unable to state, as to belief or otherwise." That is not a denial of the case of the plaintiff, who, in his affidavit, in most distinct terms, swears that he agreed to, and did in fact, lend them the same, *i.e.*, the moneys in question, upon condition that the same should be secured as well by an assignment of the said purchase agreement, when completed, as by a lien or charge on the said vessel itself." As to the agreements stated in the pleadings, the first of them, that of the 11th April, is in favour of the plaintiff; and the subsequent agreements, followed ultimately by the memorandum of the 20th May, whereby Fisher, the purchaser for whom the ship

1863.
SWAINSTON
v.
CLAY.
—
Judgment.

was originally to be built, was discharged, and whereby it was agreed that the plaintiff should become the purchaser, are of no value except for the evidence they afford of a contract for a lien, which, in my opinion, was a valid lien, and must prevail. It is well established that, where a ship is in the course of construction in the yard of the shipbuilder, and in other cases where goods are in the course of being manufactured, a possession of this kind on the part of the builder or maker, who becomes bankrupt, does not constitute such a possession as that the goods are in the reputed ownership of the constructor, and in his order and disposition within the meaning of the Bankrupt Act. Mr. Stevens's argument, that it is impossible to treat the agreement of the 12th April as any longer a binding agreement, seems to me entirely to fail. In my opinion, the plaintiff is entitled to a declaration that he has the charge or lien which the bill asserts, and a decree for the payment of what shall be found due to him; his costs to be added to his security.

A sale was ordered; the plaintiff being at liberty to prove under the bankruptcy for any balance that might be unsatisfied.

1863.

January 21.

WEST v. WEST.

A testator gave his residuary real and personal estate to trustees, upon trust as to one-third for his son and daughter as tenants in common; his son's share to be vested at twenty-four, and his daughter's on her marriage with consent of her guardians; but in case his son should die under twenty-four without leaving issue, or his daughter without having been married with such consent as aforesaid, then in trust for the survivor.

The son having attained twenty-four, and the daughter twenty-one without being married—*Held* that they were entitled in equal moieties.

Booth v. Booth (a), observed on.

THIS bill was filed on the 3rd June, 1862, by Julia Mary West, the daughter of William James West, against his widow, William Robert West, his son, and the trustees of his will, praying that the rights and interests of the plaintiff and all parties might be ascertained and declared.

William James West, by his will, dated the 7th April, 1848, devised and bequeathed all his real and personal estates whatsoever and wheresoever, to trustees, their heirs, executors, administrators, and assigns, upon trust to pay his just debts, &c., and to stand possessed of the residue of his said real and personal estates, upon trust as to one-third thereof, and of the rents, interest, and annual income thereof, for his widow for life, and, after her decease or marriage, then upon the same trusts for the benefit of his son and daughter as were next thereinafter declared. And as to another third of the said real and personal estates, "upon trust for his said son William Robert West, and his said daughter Julia Mary West, to be divided between them in equal proportions as tenants in common, and not as joint tenants, the share of his said son to be vested in him at the age of twenty-four years; and the share of his said daughter to be vested in her on her marriage, with the consent nevertheless of her guardian or guardians for the time being."

In case his son William Robert should die under twenty-four, "and without leaving lawful issue, or his said daughter Julia Mary should die without having been

married with such consent as aforesaid," then the testator declared that the share of him or her so dying, together with all accumulations, should be held "in trust for the survivors of them his said son and daughter, his or her heirs, executors, administrators, and assigns, and to be a vested interest in him or her respectively at the same age or time as his or her original share." As to the remaining one-third part of the said real and personal estates, testator gave the annual income thereof to his youngest son, James Edwin West, for life, and after his decease, "upon the same trusts for the benefit of his said son William Robert West and his said daughter Julia Mary West, as were last thereinbefore declared concerning the other one-third part of the said trust estates, so limited in trust for them as aforesaid." The testator declared that "if at his decease his said son William Robert West should not have attained the age of twenty-four years, or his said daughter should not have been married with such consent as aforesaid," it should be lawful for the trustees to apply all or any part of the income "of his or her presumptive or contingent share in his said trust estates" for his or her maintenance. He further appointed his said trustees his executors, and also, together with his wife, "to be guardians of such of his children as for the time being should be under the age of twenty-one years."

The testator died on the 24th May, 1848.

James Edwin West died under twenty-one on the 26th September, 1860. William Robert West had attained twenty-four, and the plaintiff Julia Mary West had attained twenty-one since the death of the testator.

The bill alleged that the defendants refused to pay and transfer to the plaintiff her share in the testator's residuary estate, alleging as the ground for that refusal that she had only a contingent interest, dependant on her marrying with the consent of her guardians.

1863.
West
v.
West.
—
Statement.

1863.
 WEST
 v.
 WEST*
 —
 Argument.

Mr. *Malins* and Mr. *Harding* for the plaintiff.

In the construction of a will the Court would gather the testator's meaning from the whole of the instrument, and not from an isolated expression. Applying that test, it was plain that what the testator meant was, not to make his daughter's share dependent on her marrying but simply that if she married under age with the consent of her guardians, her share should become then payable, instead of waiting until the period when, according to the ordinary rule of law, it would be payable.

The opposite construction would lead to this absurdity, that in the event of the daughter never marrying—that is, an event which would render it most important that she should have some provision made for her—the testator would be made to say that she was to have none.

Where a testator in other parts of the will treats the share of a legatee as *his* share before the specified period, or has given over the fund in a particular event, thereby implying that in every *other* event it is to belong to the legatee, the word “vesting” must be deemed to mean payable: *Berkley v. Swinburne* (a), *Taylor v. Frobisher* (b). This was exactly the present case, and it was submitted, therefore, that the plaintiff was absolutely entitled to her share.

[*Young v. Robertson* (c), and *Jarman on Wills*, 806, were also cited.]

Mr. *J. Aston*, for the son, submitted that this was a contingent legacy dependent on the legatee's marrying with the consent of the trustees.

In *Atkins v. Hiccocks* (d), where a testator devised to his daughter 200*l.*, to be paid to her at the time of marriage, or within three months after, provided she

(a) 16 Sim. 275.

(b) 5 De G. & S. 191.

(c) 8 Jur. N. S. 825.

(d) 1 Atkins, 500.

marry with the approbation of his two sons, the daughter having attained twenty-one, but died without having been married, it was held that the legacy was not vested. That was nearly the present case.

1863.
WEST
v.
WEST.
—
Argument.

Mr. *Bacon* and Mr. *Marten* appeared for the trustees.

The VICE-CHANCELLOR:—

Judgment.
—

There is great difficulty in cases of this kind. Lord Hardwicke, in the case of *Atkins v. Hiccocks*, held that, when the words referring to marriage amount to a condition precedent, until the condition is performed the legatee has not a vested interest. That is an intelligible ground of decision, and the authority of that case has never been questioned. It is certain in the present case that there is no condition precedent, and there are other authorities which show that, upon questions of this kind, the Court has done some violence to the language of the testator in order to prevent the consequences which would follow from a presumption inconsistent with the intention of the testator in favour of the legatee. In the case of *Booth v. Booth (a)* there was a gift of residue, as in the present case, upon trust to pay the dividends equally between the testator's great-nieces, Phœbe Booth and Ann Booth, until their respective marriages, and from and immediately after their respective marriages, to assign and transfer to them their respective shares and moieties thereof. That was a strong case, for there was an express life interest, with a direction to pay the capital upon the marriage of the nieces. One of the nieces died unmarried, and the question was whether her share was vested. Lord Alvanley decided that it was a vested interest, although the event of marriage had never occurred. Looking at the whole will, and doing violence to the par-

(a) 4 Ves. 399.

1863.
 WEST
 v.
 WEST.
 Judgment.

ticular words which said that the capital was to be paid upon marriage, he held that the capital was vested and transmissible, though the lady was never married at all. In that case the Court had to consider the various authorities, and amongst the rest, the case of *Atkins v. Hiccocks*; and Lord Alvanley, in deciding in favour of the niece, who had never been married, relied very strongly upon the circumstance that the subject-matter of the gift was not a legacy of specified amount, but a share of residue. That seems a small distinction, but it is beyond a doubt that this Court, in questions of this kind, has made a distinction in favour of residuary legatees.

Sir W. Grant, in *Leake v. Robinson* (a), had occasion to consider the decision of Lord Alvanley in *Booth v. Booth*, and, after criticising the judgment of Lord Alvanley, he ends by expressing his strong approbation of the principle upon which that learned judge proceeded. At p. 386 Sir W. Grant says, "I am aware that, though in regard to particular legacies, this doctrine," that is, in favour of vesting, "has not been controverted, yet the case of *Booth v. Booth* may be considered as throwing some doubt upon it, when it is a residue that is the subject of the bequest. There is certainly a strong disposition in the Court to construe a residuary clause so as to prevent an intestacy with regard to any part of the testator's property. With all that disposition, it is evident that Lord Alvanley felt that he had a difficult case to deal with. Some violence was done to the words in favour of what he conceived to be, and what in all probability was, the intention. That intention, however, was collected from circumstances that do not occur in the present case. Both the legatees were adults at the time the will was made, Lord Alvanley admits that, if it had been otherwise, it might have made some ingredient in the argument." He goes on with

(a) 2 Mer. 363, 386.

further observations on the case of *Booth v. Booth*, and adopts the principle on which that decision was founded.

In the present case there is a clear manifestation of bounty towards this daughter, and the whole question seems to be whether these words which refer to her marriage were or were not intended to give her a beneficial interest, in regard to the time of vesting, greater than the testator intended to give to her brother. This is a case of a gift of residue, as in the case of *Booth v. Booth*. But there is no direction like that in *Booth v. Booth*, where the first gift was to the daughter, of the dividends, with a subsequent direction, in the particular event, to pay the capital; but it is a gift of residue with an express trust for the son William Robert, and the daughter Julia Mary West, to be divided between them in equal proportions as tenants in common, and not as joint tenants. These words are free from all doubt. The testator intended that the son and daughter, at some time or other, should take the whole equally between them as tenants in common. Having said that, he goes on to say that the share of the son is to be vested at twenty-four. He might have said the same thing as to the daughter, but she was only eighteen, and he contemplated that she might marry before twenty-one, and he intended if she married before twenty-one that it should be with the consent of her guardians, and that her share should be then payable. That was a rational intention, and is expressed by these words:—"the share of my daughter to be vested in her upon marriage with the consent of her guardians or guardian for the time being." It seems very clear that her marriage with the consent of guardians must mean her marriage under twenty-one; for if her marriage did not take place under twenty-one she could not have any guardian. The testator meant that if she married under twenty-one without consent the legacy should not then vest in her. But it is a rational intention

1863.
WEST
v.
WEST.
—
Judgment.

1863.

WEST

v.

WEST.

Judgment.

in this respect that he should give her a greater benefit than he did to his son, whose share was not to vest until twenty-four. He goes on to say, "in case Robert William should die under twenty-four, and without leaving lawful issue, or his said daughter Julia Mary should die without having been married with such consent as aforesaid." These words "die without having been married with such consent as aforesaid," must mean nothing else than "die under twenty-one unmarried." Thus, if she died unmarried under twenty-one, her share was to go to her brother. This gift over in the event of dying before vesting would be almost nonsense if the construction contended for by the brother and trustees were to prevail. Suppose the son died under twenty-four, what was to become of the two shares? There is a clear gift of them to the daughter as the survivor, and in that event, if the will is to be construed, with reference to the marriage, that the daughter was to take a vested interest if she married with the consent of guardians—and that could not occur after twenty-one—the whole gift would fail. Sir W. Grant said that a gift of residue was a different thing from a gift of a legacy, and that the Court would, if possible, construe the words so as to prevent an intestacy. But here would be an intestacy of the whole if the daughter survived and married at thirty, the son dying under twenty-four: neither could take a share of the residue. It is a conclusion entirely different from the intention to be collected from the whole scope of this will. It is, I think, a stronger case than that of *Booth v. Booth*, where it appeared that the Court wished to accelerate vesting and to prevent intestacy.

Under the circumstances, it seems to me that the plaintiff is entitled to a declaration that her share is vested, and I think the proper order will be to declare that the son and daughter are entitled absolutely.

The declaration was that according to the true con

struction of the will, and in the events which had happened, the plaintiff and her brother were absolutely entitled in equal moieties to the entirety of the real and personal estates, subject to the interest of the widow in one-third during her life.

1863.

WEST
v.
WEAT.

Judgment.

HOLDEN v. RAMSBOTTOM.

JAMES RAMSBOTTOM by his will, dated the 5th February, 1855, made the following disposition:—

“I give the said Eleanor Holden also absolutely all the furniture, except plate and pictures, which may be in the said house at my decease.” At the time of his death the testator had in the house a plated service; he had at that time at his bankers a service of solid silver, and other silver articles.

Bequest by testator of all the furniture (except plate and pictures) which might be in a house mentioned at his decease—
Held to be confined to articles of solid silver, and not to include a plated service in the said house.

Mr. *Bacon* and Mr. *Beck*, for the executors, contended that by the word “plate” must be understood both the solid silver and plated articles in the house, and that they were within the exeption.

Argument.

Mr. *Malins* and Mr. *Forster*, for the legatee, contended that plate only referred to solid silver. They cited *Roper on Legacies* (a), *Kelly v. Powlett* (b), *Cremorne v. Antrobus* (c).

The VICE-CHANCELLOR:—

Judgment.

The only question is as to the construction of the

(a) Vol. 1, 291, c. 4, s. 1.

(b) Ambler, 605.

(c) 5 Russ. 312.

1863.
HOLDEN
v.
RAMSBOTTOM
—
Judgment.

word "plate" as used in the exception from the gift of furniture. It is to be observed that the gift is of all the furniture in the said house, and that it is from this particular furniture that the testator excepts the plate and pictures. It is admitted that if the exception had not been made every article of plate would have passed under the description of furniture. The single question seems to be, whether there is enough to authorise the Court to hold that the testator used the word in any other than its proper sense; and my opinion is, that there is nothing in the context of the will or in the evidence as to the situation of the testator with regard to the time of gift, legitimately to show that the word was not used in its proper sense. Therefore the exception applies to the word "plate," properly so called, and plate properly so called does not include plated articles. The declaration will be that that the plaintiff is entitled to all the plated articles mentioned in the schedule to the defendant's answer, and there will be an order that they be delivered to her within one month from the service of the order.

Decree accordingly.

SWEET v. MEREDITH (a).

1863.

Jan. 12th.

MR. KARSLAKE moved that the contract in this case might be rescinded, and all proceedings stayed in the suit; reserving liberty to the plaintiff to apply to assess the damages. The bill was filed by the plaintiff the vendor, against the defendant, the purchaser, to enforce a contract for the sale and purchase of the advowson of Kentisbury, North Devon, for the sum of £5500. On the 18th March, 1863, a decree for specific performance of the contract was made, by which the title was ordered to be accepted, and directing that on the plaintiff executing a conveyance to the defendant the latter should pay the purchase-money on the 16th day of August, 1862, or within seven days after the service of the order.

The money not being paid at the day fixed, the plaintiff obtained a writ of attachment against the defendant, who had gone out of the jurisdiction.

The Vice-Chancellor made the order in the terms of that made in *Foligno v. Martin* (b), the plaintiff to be at liberty to apply in respect of any damages sustained from the breach of contract.

The order was finally passed in the following terms:—

“Upon motion this day made unto this Court by counsel for the plaintiffs, George Sweet and William Fort Sweet, and upon reading an affidavit of John Stephens of notice of this application to the defendant, Robert Fitzgerald Meredith, a decree dated the 18th March, 1862, an order dated the 16th April, 1862, an order dated the 9th day of August, 1862, and an

After a decree for specific performance of a contract to purchase for payment, and an attachment for default, on motion by the plaintiff the Court ordered the contract to be rescinded, and all proceedings stayed, except as to such application to this Court as might be made by the plaintiff to assess the damages occasioned by the breach of contract by the defendant.
Foligno v. Martin, 16 Beav. 586, followed.

(a) For a report of the case see *antè*, 3 Giff. 610. (b) 16 Beav. 586.

1863.
 SWEET
 v.
 MEREDITH.

affidavit of the plaintiff William Fort Sweet, filed the 6th day of January, 1863, this Court doth order that the contract mentioned in the pleadings of the first-mentioned cause, and set forth in the third, sixth, and seventh paragraphs to the plaintiffs' bill therein, be rescinded, and that all further proceedings in this cause be stayed, except as to any application which may be to this Court to award and assess the damages which the plaintiffs George Sweet, clerk, and William Fort Sweet, clerk, have sustained by reason or in consequence of the breach of the said contract: and it is ordered that the defendant Robert Fitzgerald Meredith do pay unto the plaintiffs George Sweet and William Fort Sweet their costs of this application, to be taxed by the taking master."

Dec. 10.

SHEPARD v. BROWN.

Demurrer to a bill seeking a discovery, and an account of goods sold by the defendant, on the price of which the plaintiff was entitled to a commission overruled with costs.

On questions of account, Courts of Equity and Courts of

Law possess concurrent jurisdiction, and the decision as to the proper tribunal must be governed by considerations of convenience.

Phillips v. Phillips, 9 Hare, 471, observed on.

THIS was a general demurrer for want of equity.

The bill alleged that the defendants, John Brown, William Bragg, and John Devonshire Ellis, for some time previously to, in, and ever since May, 1860, carried on at the Atlas Sheet Steel Works, Sheffield, as partners under the style of John Brown & Co., the trade of manufacturers of steel and iron goods. Previously to May, 1860, and ever since, the said firm had an office at No. 33, Broad Street Buildings, in the City of London, and J. C. Bayley, the brother-in-law of Mr. Bragg, was in

May, 1860, and had for some time previously been, and has ever since continued to be, the general agent and representative of the London firm. The said firm had before and in May, 1860, and had ever since, an office, 23, Boulevard des Italiens, at Paris; and one Chapman was in May, 1860, and for some time previously had been, the firm's general agent and representative at Paris.

1863.
SHEPARD
&
BROWN.
Statement.

The plaintiff had for many years had an extensive connection with Continental railway companies, and their directors, managers, and other officials, and in particular in May, 1860, was, and had for some time been, acquainted with M. Bricogne, the engineer of the Chemin de Fer du Nord in France, and M. Loustrau, one of the chief officials of the said company. Early in 1860 the plaintiff became acquainted with J. C. Bayley, and was asked by him whether he (plaintiff) could introduce J. Brown & Co's. iron goods to the French railway companies. The plaintiff was willing to undertake such introduction, and the terms, having been discussed between the plaintiff and the said J. C. Bayley, were ultimately reduced into writing and embodied in the following letter :—

“ E. C. Shepard, Esq.

“ Atlas Steel Works, Sheffield.

“ May 8, 1860.

“ Dear Sir,—We shall be most happy to hand you a commission of $7\frac{1}{2}$ per cent. on all orders you may obtain for us in steel from the Chemin de Fer du Nord, and the Chemin de Fer d'Orleans, in France, whether directly or indirectly traceable to you, it being understood that so long as the said railway companies continue to purchase steel from us we will allow you this commission.

“ We are yours very faithfully,

“ P. p. John Brown & Co.

“ (Signed) J. C. BAYLEY.”

1863.
SHEPARD
v.
BROWN.
Statement.

The said letter was in the hand-writing of the said J. C. Bayley, and it was on the day of the date thereof signed by said J. C. Bayley on behalf of the firm of John Brown & Co., delivered to the plaintiff by the said J. C. Bayley at the London office of the said firm.

The said firm of John Brown & Co. had not at the date of the letter of the 8th May, 1860, supplied any goods to the companies mentioned in the said letter. After he had signed the letter, J. C. Bayley gave the plaintiff several books of patterns, &c., in order that the same might be shown to the engineers of the railways. On the 7th July, 1860, J. C. Bayley wrote and sent to the plaintiff the following letter :—

“ 33, Broad Street Buildings.

“ New Broad Street, London.

“ July 7, 1863.

“ Dear Sir,—Have you heard from Bricogne yet? I have heard a Monsieur Petiet, of Great Northern France, has been giving orders for locomotives, &c., for that railway in Leeds and Manchester. Don't let this matter slip through your fingers if you can help it. When do leave for France?

“ Cordially yours.

“ J. C. BAYLEY.

“ E. C. Shepard, Esq.”

The plaintiff shortly after the receipt of the first-mentioned letter made a journey to Paris at his own expense, and for the sole purpose of introducing the goods of the said firm of John Brown & Co. to the railway companies mentioned in the said letter of the 8th of May, 1860, and took with him the books of patterns and other particulars which had been supplied to him as aforesaid by the said John Clowes Bayley. The plaintiff remained at Paris during ten days, and during that time had frequent in-

interviews with Monsieur Bricogne and Monsieur Loustrau, and with the other officials of the said railway companies, and laid before them and left with them the said patterns and other particulars, with which none of them were previously acquainted, and urged upon them very strongly the adoption by the said companies of the goods of the said firm of John Brown & Co.

The plaintiff made other journeys to Paris subsequently, and employed part of his time on such occasions in endeavouring to obtain orders for the said firm of John Brown & Co. from the said railway companies. He incurred expenses on the occasion of such journeys in endeavouring to further the interests of the said firm.

The plaintiff having incurred considerable expense and loss of time in and by his said journeys to and stay at Paris, and having exerted himself to the utmost of his power and influence in introducing the goods of the said firm of John Brown & Co. to the said railway companies, became aware, in or about the month of November, 1860, that an order for a large number of steel buffers had, in consequence of the said introductions, been sent to the said firm of John Brown & Co. from the Railway Company of the Chemin de Fer du Nord; and he has since ascertained that other orders to a very large amount have, in consequence of the said introduction, been given by the said railway company of the Chemin de Fer du Nord and the Chemin de Fer d'Orleans, or one of them, to the said firm of John Brown & Co., and that the said orders have been accepted and executed by the said firm.

The plaintiff himself has frequently applied to the defendants, and to the said John Clowes Bayley, for an account of the orders obtained as aforesaid, and payment of his commission thereon in accordance with the terms of the said letter of the 8th May, 1860, but he has not been able to obtain any satisfactory answer, information, or account.

1863.
SHEPARD
v.
BROWN.
—
Statement.

1863.
 SHEPARD
 v.
 BROWN.
 —
Statement.

The bill then set out certain letters between the plaintiff's solicitor and the firm of John Brown & Co. on the subject of the plaintiff's demand. On the 14th June, 1862, the said firm wrote and sent to the plaintiff's solicitor the following letter:—

“ John Brown & Co.

“ Atlas Steel Spring and Iron Works, Sheffield.

“ June 14th, 1862.

“ MR. S. COOK FRANKISH,

“ 23, Parliament Street,

“ London, S.W.

“ Sir,—In reply to your note of this day the letter you send us a copy of was not authorised by us in any way, and was not given by our consent or knowledge. Mr. Bayley had not the power to commit us in the matter, and your client Mr. Shepard was informed that we should not in any way recognise the same. We must express our great surprise that your client should have attempted to make an agreement with one of our representatives instead of ourselves, and then apply here afterwards asking us to confirm the same. He was then informed we should not in any way recognise such an agreement, which he said he had got, but did not produce, and which we had no knowledge of at that time. We also now repeat we are not, and shall not, be bound in any way to that agreement so called and obtained in such a way that cannot be binding legally, and certainly not equitably; and further we have not, as it happens, supplied any steel in any way to the parties named. We are glad such is the case, because it defeats an unfair and improper attempt to take money from us not due: at least, the correspondence would, we think, justify such a conclusion. If you are not now satisfied, we refer you further to our solicitor, Mr. George Marples, Sheffield.

“ Yours, &c.,

“ JOHN BROWN & Co.”

The plaintiff alleges and charges that the said John Clowes Bayley had authority from the said firm of John Brown & Co. to make with the plaintiff the agreement contained in the said letter of the 8th of May, 1860, and that the said agreement was so made by the said John Clowes Bayley as aforesaid with the plaintiff in the ordinary and usual course of business; and that the said John Clowes Bayley has informed the plaintiff, and that it is the fact, that he, the said John Clowes Bayley, has frequently made agreements of a similar character with other persons, which have been recognised and acted upon by the said firm; and that large sums of money have frequently been paid by the said firm for commission to persons with whom the said John Clowes Bayley has made agreements of a similar character to that contained in the said letter of the 8th of May, 1860.

1863.
SHEPARD
v.
BROWN.
—
Statement.

The plaintiff further alleges and charges that the said letter of the 8th of May, 1860, was written, signed, and delivered to the plaintiff as aforesaid by the said John Clowes Bayley, with the actual consent and knowledge of the defendants, or some or one of them, or if not then that the contents of the said letter, and the fact of the same having been so written, signed, and delivered to the plaintiff as aforesaid by the said John Clowes Bayley, were or was, on or shortly after the 8th of May, 1860, communicated by the said John Clowes Bayley to the defendants, or some or one of them, and that the hereinbefore stated letter of the 7th of July, 1860, was written and sent by the said John Clowes Bayley to the plaintiff with the consent and knowledge of the defendants, or some or one of them, and that the defendants, or some or one of them, were or was, on or shortly after the 8th of May, 1860, well aware that the said John Clowes Bayley had given the plaintiff books of patterns and other particulars of the goods manufactured by the said firm of John Brown & Co., in order that the plaintiff might take

1863.
 SHEPARD
 v.
 BROWN.
 —
Statement.

the same to Paris, and lay them before the engineers and other officials of the French railway companies mentioned in the said letter of the 8th of May, 1860; and that the said John Clowes Bayley was in or about the month of July, 1860, urging the plaintiff to proceed to France for the purpose of introducing and obtaining orders for the purchase of the goods of the said firm of John Brown & Co. to the said French railway companies, and that the plaintiff was contemplating a journey to Paris for that purpose; and the plaintiff charges that the defendants did not, nor did any or either of them, at any time previously to his departure for Paris, on or about the 14th day of July, 1860, for the purpose aforesaid, express any dissent from or make any attempt to repudiate the agreement contained in the said letter of the 8th of May, 1860.

The plaintiff further alleges and charges that it is untrue that the said firm of John Brown & Co. have not supplied any steel in any way to the parties named in the said letter of the 8th of May, 1860, for the said John Clowes Bayley and

Chapman have respectively admitted to the plaintiff, and it is the fact, that steel goods to the amount of £8000 and upwards have been supplied by the said firm to the said Company of the Chemin de Fer du Nord since and in consequence of the introduction of the goods of the said firm by the plaintiff to the said company in manner aforesaid; and the plaintiff has lately seen a letter from the said Monsieur Loustrau to the said

Chapman, containing an order for twenty-five sets of buffers, at £10 per set, to be supplied by the said firm to the said Company of the Chemin de Fer du Nord.

The plaintiff charges that under the circumstances aforesaid he is entitled to a commission of $7\frac{1}{2}$ per cent. on all orders for steel goods that have been or may hereafter be given to the said firm of John Brown & Co. by the companies mentioned in the said letter of the 8th of May,

1860, or either of them; and that the defendants ought to set forth a true statement and account of all orders which have been received by the said firm up to the present time from the said companies, or either of them, and ought to account to the plaintiff for the commission thereon after the rate aforesaid.

The bill contained the usual charge as to documents, and prayed, *inter alia*—

1. That the defendants might make a full and true discovery and disclosure of and concerning the same.

2. That it might be declared that the said letter of the 8th May, 1860, was binding upon the defendants.

3. That an account might be taken under the decree of the Court of what is now due to the plaintiff in accordance with the terms of the letter of the 8th May, 1860.

4. That the amount found due might be paid, &c.

Mr. *Malins* and Mr. *C. Barber* for the demurrer.

The proper tribunal for the decision of the claim raised by this bill was a court of law. The plaintiff might possibly have filed his bill for discovery in the ordinary way—though even as to that he might have had as full discovery at law as in this Court. But he cannot mix up with a bill for discovery a claim for relief which was properly cognizable in a court of law. The bill asked first for discovery, and then went on to ask for such an account as would ordinarily be tried before a jury. His claim was, to be paid the amount to which he was entitled by commission on the sale of goods. There was no allegation of mutuality in the accounts, or of any confidential relation between the parties. The bill prayed, indeed, that Bayley might be declared to be the agent of the defendants; but that was only one part of the plaintiff's title at law.

1863.
SHEPARD
v.
BROWN.
Statement.

Argument.

1863.
 SHEPARD
 v.
 BROWN.
 ———
Argument.

In *Dinwiddie v. Bailey (a)*, a bill was filed by an insurance broker for an account of money paid and received by him in that capacity on account of the defendants, and money due to him for commission, and for promissory notes, and to restrain an action as brought contrary to the usual custom; but a demurrer was allowed to the bill on the ground that the proper remedy was at law.

In *Phillips v. Phillips (b)*, a demurrer was allowed to a bill seeking an account on the ground that there was no mutuality as to the account except as to a few payments which were matter of set-off, though the bill alleged that as to particulars the defendant had acted as agent of the plaintiff.

In *Padwick v. Stanley (c)*, it was held that it by no means followed that, because a principal had a right against his agent, the agent had a right against the principal. It was submitted on these grounds that the demurrer must be allowed: *Pearce v. Cresswick (d)*, was also cited.

Mr. Bacon and Mr. Fitzhugh for the bill.

The plaintiff, though he might have some remedy, could not have complete remedy at law, and on that ground alone this bill could be sustained: *Adley v. The Whitstable Company (e)*. That a plaintiff could have relief in addition to discovery has been laid down in *Ryle v. Haggie (f)*. In that case Sir Thomas Plumer said, "Where a party comes here properly for the discovery, the Court is never disposed to occasion a multiplicity of suits by making him go to a court of law for the relief.

Possibly the plaintiff might have obtained some account at law, but the jurisdiction of this Court on matters of account was concurrent with that of courts of law,

(a) 6 Ves. 136.

(b) 9 Hare, 471.

(c) *Ib.* 627.

(d) 2 Hare, 286.

(e) 17 Ves. 315.

(f) 1 J. & W. 234.

and this Court would not fetter itself by an inflexible rule as to matters of account: *North-Eastern Railway Company v. Martin* (a). (*Mackenzie v. Johnston* (b) was also cited.) See *Smith v. Leveaux* (c), *Foley v. Hill* (d).

1863.
SHEPARD
v.
BROWN.
—
Argument.

The VICE-CHANCELLOR:—

Judgment.
—

The substance of the plaintiff's case is, that he was employed by the defendants to obtain orders for goods manufactured by them, and that he was to be allowed remuneration in the shape of commission upon the amount of all goods sold under orders which were obtained through his exertions. Upon that he comes to the Court and prays relief, first in the shape of a declaration that the defendants are bound by the letter of their agent, which promised the remuneration, and next he seeks an account of all orders received and executed by the defendants through his exertions, and to have it ascertained how much is coming to him for commission in respect of the quantity of goods so sold. It is said in support of the demurrer that at law he might recover in an action the whole amount of that commission which he seeks to recover by account in this Court. In order to recover at law, however, he must be able to prove what orders have been received, how much has been sold by the defendants, and what has been received by them in respect of the sales, in order to ascertain the amount of the commission. It is plain, from the allegations in the bill, that, as the transactions of sale are transactions by the defendants and not by the plaintiff, there must be in the custody of the defendants that which affords material evidence for the plaintiff to enable him to recover at law or in equity. It cannot be denied that a bill for discovery would lie. The argument that this Court has lost its jurisdiction in regard to discovery

(a) 2 Phill. 738.
(b) 4 Mad. a 373.

(c) 1 H. & M. 122.
(d) 2 H. of L. C. 28.

1863.
 SHEPARD
 v.
 BROWN.
 —
Judgment.

because since the recent Act courts of law have had given to them a jurisdiction of discovery is an argument not to be countenanced. I know of no authority to justify me in holding that this Court has lost the power to enforce discovery.

Where the case of the plaintiff is one in which he seeks an account of transactions and dealings with the defendants, the evidence of which transactions must remain principally, if not entirely, in the hands of the defendants, it is extremely difficult to say that, upon a bill seeking an account of that kind upon a case so stated, this Court has no jurisdiction*to entertain it.

Lord Cottenham, in the case cited of *The North-Eastern Railway Company v. Martin*, decided that, upon a question of account, where courts of common law and of equity have concurrent jurisdiction, if a question arise, whether the remedy for an account should be at law or in equity, it should be decided with a view to the most convenient mode of having the question decided. In some cases it may appear very plainly that the question would be more conveniently decided at law: in others, that it may be more conveniently decided in a court of equity. In the case of *Dinwiddie v. Bailey*, where a bill was filed by a broker for an account, in order to enable him to recover the amount of his commission, Lord Eldon said, "It is clear this case might be disposed of altogether at law. It is another question whether the jurisdiction of this Court might not attach upon it." If the jurisdiction for discovery be allowed, it is difficult to see upon what principle this Court can refuse relief, where the question is one of convenience.

In the case of *Mackenzie v. Johnston*, Sir John Leach had before him, on demurrer, the case of a bill filed by a principal against an agent whom he had employed to sell goods for him. That is like this case, except that

here the bill is by an agent against his principal. It was not—it could not be—doubted in *Mackenzie v. Johnston* that an action at law would lie, and the demurrer was argued on the ground of the question being one to be properly tried in a court of law. In overruling the demurrer, Sir John Leach said, “The defendants here were agents for the sale of the property of the plaintiff, and wherever such a relation exists a bill will lie for an account. The plaintiff can only learn from the discovery of the defendants how they have acted in the execution of their agency, and it would be most unreasonable that he should pay them for that discovery if it turned out that they had abused his confidence; yet such must be the case if a bill for relief will not lie.” Lord Eldon, in the case of *Adley v. The Whitstable Company*, observed, “It is said that the party may have a discovery [which is what would happen here, the jurisdiction as to discovery being admitted] and then go to law. The answer to that is, that the right to discovery carries along with it the right to relief in equity.” Why? Because, when relief is sought in the shape of an account, courts of law and equity have, generally speaking, a concurrent jurisdiction. Sir Thomas Plumer, in the case of *Ryle v. Haggie*, states precisely the same view. In the case of *Pearce v. Creswick*, Sir James Wigram does not state any one proposition, nor does he decide the case in any way which supports the argument in favour of this demurrer. The case, then, is this: it is one in which, either at law or in equity, an account must be taken; one in which the right to discovery in equity is admitted; and what I have to decide is, whether, since the late Act of Parliament, there is no longer any jurisdiction to direct an account. I should not be justified in taking any such view. It is very true that in the case of *Phillips v. Phillips* Vice-Chancellor Turner said that, in order to maintain a bill of this nature, there

1863.
SHEPARD
v.
BROWN.
—
Judgment.

1863.

SHEPARD,

v.

BROWN.

Judgment.

must be mutual demands, and that each of the parties must have received and paid money on account of the other. And he said that it would require a strong case for a court of equity to entertain a bill for an account when the account is all on one side. In the present case it may possibly appear that the account is on one side; but it would be hardly fair to assume that. This is a case in which the plaintiff might have had in this Court a discovery (which is a remedy in aid of the right of account), and I cannot send him out of this Court to seek relief in a court of law. I must therefore overrule this demurrer.

O'BRIEN v. LEWIS.

1869.

Dec. 3, 4.

THIS amended bill was filed by the plaintiff praying—

1. That it might be decreed that the defendants were liable to pay to the plaintiff 300*l.* improperly retained by them as aforesaid, with interest thereon at the rate of 5*l.* per cent.

2. That an account might be taken of all sums of money received by the defendants, or either of them, or for their use as solicitors, attornies, agents, or otherwise, on behalf of the plaintiff; or which were paid to the defendants while acting as attornies or solicitors for the plaintiff in respect of matters in which they were acting on his behalf; and also an account of all sums paid by the defendants to the plaintiff, or on his account, which the defendants were entitled to deduct from the monies so received by them as aforesaid. That the account might be taken with annual rents, and that, if necessary, in taking such account the defendants might be charged with the said sum of 300*l.* so improperly retained as aforesaid, and also with interest at 5*l.* per cent. per annum on the balances for the time being in their hands; and that the defendants might be decreed to pay to the plaintiff the balance which should be found due to him on taking the account.

A gift made by a client to his solicitor during the subsistence of the professional relation between them is invalid; therefore, where a client during the subsistence of such relation, told his solicitor to retain a sum of 300*l.* out of moneys coming to the client, on a bill by the client for an account the Court decreed a general account, with a direction that the defendants were not to be allowed the said 300*l.*, and ordered the defendants to pay the costs of the suit.

The bill alleged that the defendants were solicitors and attornies in partnership, carrying on business at 10 Ely Place, Holborn, and were employed by the plaintiff as his solicitors and attornies for the first time in the year 1850, and were employed by him up to the year 1861. The bill alleged that the matters in which they were employed professionally consisted in recovering

1862.
O'BRIEN

v.
LEWIS.

—
Statement.

debts due to him from various persons, and in settling his pecuniary affairs and difficulties.

The bill alleged that the defendants did not deliver to the plaintiff any bill of costs in respect of the matters in which they were employed, but when moneys were received by them for the plaintiff, such moneys were usually received by the defendants, who sometimes deducted thereout lumped or specified sums, which they alleged to be their costs, or due to them for costs, and paid to the plaintiff the residue; and at other times paid to the plaintiff a portion of the sums received by them in respect of such debts and matters, and had concealed from the plaintiff the amounts actually received, and retained for themselves all the residue of the moneys received by the defendants in respect of such [debts and matters, without rendering any account to the plaintiff of the sums, or of the items for which deductions were made; and the defendants sometimes alleged that they were entitled to retain such residue and excess, not as being the amount of costs properly due to them, but as being an excess above what the plaintiff would have been willing to accept as a composition for such debts, and that therefore he was not entitled to such residue or excess. During the whole period during which the defendants were employed by the plaintiff they were his confidential solicitors, and he acted under their advice; and, having no other professional assistance, he did not know that he could compel them to deliver bills of costs to him under such circumstances; besides this he did not consider it prudent to oppose them, for he was at and during the whole time he so employed them in pecuniary embarrassment, and he had upon a few occasions, in the course of such employment, and pending such transactions, applied to the defendants for temporary loans of sums of money, which were made to him, but which, however, have been all since repaid: in fact, the embarrassments of the

plaintiff increased upon him during his connection with the defendants, and the plaintiff was on one or two occasions arrested for debt, and was imprisoned in the Queen's Prison; and vesting orders, which have been since vacated, were obtained against the plaintiff from the Insolvent Court, and on all such occasions the defendants acted as his solicitors, and the plaintiff was altogether during such transactions in the hands of the defendants, and has not been until within a short period before the filing of this bill in a position to compel the defendants to account to him for what they had on his behalf and in his said business.

In 1852 the plaintiff brought his action on certain bills of exchange for sums between 800*l.* and 900*l.* against Mr., now Sir Robert, Clifton, who owed the plaintiff a further sum of 500*l.* and upwards. Mr. Clifton filed his bill in this Court for an account and to restrain the action. The present defendants acted as the plaintiff's solicitors, and put in his answers in that suit. Mr. Clifton's solicitor was Mr. Davis. On the 3d April Mr. S. C. H. Lewis met the plaintiff in the street, and said that Mr. Davis, on behalf of Mr. Clifton, wished to settle with plaintiff, and if the plaintiff would give up the said bills of exchange and certain letters, and drop his prosecution of Messrs. Davis for an assault, and release plaintiff's claim on Mr. Clifton, the latter would pay plaintiff 800*l.*; plaintiff in reply said his claim against Clifton exceeded 800*l.* in respect of other sums. Whereupon S. C. H. Lewis said, "Agree to the 800*l.*, drop the proceedings against Davis, and I'll get you the difference," and fixed an interview for carrying out such arrangement. When plaintiff arrived at the place of meeting he found J. P. Davis there. The costs due to them for litigation with R. Clifton were hurriedly called over in lump sums, and were made out to amount to 130*l.*, from which 10*l.* was deducted at Davis's request, and then 800*l.* was paid by Davis to the defendants for the plaintiff's use for the debt

1852.
O'BRIEN
v.
LEWIS.
Statement.

1862.
O'BRIEN
v.
LEWIS.
—
Statement.

claimed from Clifton, and 120*l.* was paid by Davis to the defendants for costs, whereon the plaintiff signed for delivery to Davis a general release of all demands which had been prepared by the defendants. Afterwards these letters had been procured from Mr. Kealy by paying him the money for which he claimed to hold them, and were delivered to Davis; no receipt was asked for or given by the plaintiff for 800*l.* J. P. & D. J. Davis were afterwards sentenced on their conviction (for an assault) to a nominal punishment only. The plaintiff believed that no money was received by the defendants except the said 120*l.* and 800*l.*, but he afterwards learned that Mr. Clifton or his father had been charged 1000*l.* for the money paid in addition to the 800*l.* and costs. The bill then proceeded as follows:—

The defendants accounted to the plaintiff for 500*l.* only, part of the sums received from the said Mr. Davis, and appropriated the sum of 300*l.* the residue thereof and said costs to their own use, although the said sum was received by them while acting as the solicitors for the plaintiff, and on account of the said settlement, and of his claims as aforesaid and arising thereout, and ought to have been paid or accounted for to the plaintiff. The defendants admit that they so appropriated the said sum of 300*l.* besides the said costs, but they allege that the plaintiff made them a present of, and told them to retain 300*l.* (part of the said sum of 800*l.*) and to keep the same as a present to them the defendants. Such allegation, however, is altogether untrue. The plaintiff did not make the defendants a present of the said sum of 300*l.*, and the plaintiff charges that, even had he told the defendants to keep such sum of 300*l.* as a present, they, the defendants, would not be entitled to retain the same, inasmuch as being the solicitors of the plaintiff they had no right to make a gain at the expense of their said client in the said arrangement with the said R. Clifton and J. P. Davis.

In 1854 the plaintiff, through the defendants, recovered a judgment against Lord Conyers for 1200*l*. In 1859 Lord Conyers filed a bill against the plaintiff and the defendants in this Court to restrain proceedings on that judgment. The defendants put in an answer, and the plaintiff also filed his answer through Mr. Foulger. The suit did not proceed beyond the answer. The defendants claimed to be interested in the matters in question in that suit on account of a lien for 225*l*., which they claimed partly for money lent to the plaintiff and partly for costs, on the security of the judgment as well as on other securities. In 1860 the claim against Lord Conyers was paid with interest and costs, including the said 225*l*. to the present defendants, and such suit was dismissed. The defendants received the 225*l*., and accounted to the plaintiff for a sum which they stated to be the residue of the sum which they stated they had received in respect of such principal, interest and costs, and matters.

The way in which the 225*l*. claimed by these defendants to be due to them was made up was explained verbally only to the plaintiff by the defendants, and he was told it consisted of the sum of 158*l*. for costs in the matter of Don and Ward, and small sums of cash advanced to the plaintiff, the interest thereon, and of two other sums of 55*l*. and 12*l*. respectively, of which 55*l*. had been lent to the plaintiff by G. C. H. Lewis, and the 12*l*. was expressed to be added for sundries and contingencies; the three said sums of 158*l*., 55*l*., and 12*l*. making up together the said sum of 225*l*. The bill alleged that the defendants pretended that, in addition to the sum of 225*l*., a further sum of 20*l*. for money lent to the plaintiff was due when they filed their answer, and that they omitted through inadvertence to claim the said 20*l*., but the allegation was untrue, and was a mere afterthought. Soon after the answer in Lord Conyers's suit had been filed the plaintiff gave G. C. H. Lewis a cheque for 55*l*., which was paid, in 1860. After the sum

1860.
O'BRIEN
v.
LEWIS.
—
Statement.

1862.
 O'BRIEN
 v.
 LEWIS.
 —
Statement.

of 225*l.* had been paid plaintiff asked G. C. H. Lewis for the said 55*l.*: he replied, "Oh, we will look up the account and see what you owe us," or words to that effect. The defendants had not subsequently demanded payment of any costs, and the plaintiff was not indebted to them on any other account.

The defendants allege that on the 28th August, 1861, the plaintiff owed them a large sum for costs, but in their answer in *Conyers v. O'Brien* they had no claim for costs beyond 150*l.*, which has been since paid. On the 18th March, 1861, an order of the 4th September, 1860, vesting the plaintiff's estate in the provisional assignee of the Insolvent Court was vacated, and nothing was then due or claimed for costs from the plaintiff by the defendants, who themselves prepared the affidavits filed when the order was vacated. All the costs since incurred by the plaintiff to the defendants had been paid except trifling sums for vacating the vesting order, and obtaining a writ of habeas which the plaintiff has always been ready to pay for. The plaintiff, being unable to recover the said 55*l.*, and about the middle of the year 1861 being no longer indebted to or under the influence of the defendants, in August, 1861, applied to his present solicitor to aid him in obtaining payment of the sum of 55*l.*, and for an account of all other matters. Mr. C. Lewis, the plaintiff's present solicitor, wrote insisting on an account, which the defendants refused, but ultimately sent the plaintiff's solicitor a cheque for 55*l.* payable to the order of John O'Brien, Esq., *re Conyers*, but they did not furnish the account required. The plaintiff thereupon filed this bill. The 10th paragraph of the bill was as follows:—

The plaintiff charges that the defendants are bound to pay to the plaintiff the balance of the said sum of 120*l.* paid to them by Robert Clifton as aforesaid, and any other sums paid to them for costs after deducting thereout the amount actually due to the defendants for costs in

the said matter, which ended in the said arrangement with the said Robert Clifton, which costs the plaintiff believes could not amount to more than 35*l.* or thereabouts.

The defendants by their answer admitted having acted as the plaintiff's solicitors and attorneys in the matters and during the time mentioned in the plaintiff's bill. That they delivered no bill of costs, and that when moneys were recovered by them (the defendants) it was undoubtedly received by a member of the firm. They admitted that, under the circumstances thereafter set forth in the action by the plaintiff against E. R. Clark, they retained 50*l.* and in the action by the plaintiff against General Charretie 10*l.* out of the moneys received, both of which sums were retained for costs. They alleged that they had the residue of the moneys recovered to the plaintiff, and denied that they ever retained any other sums. That with the above exceptions and with the exception of 9*l.* 12*s.* in respect of the arrangement with Mr. Forbes they paid the plaintiff the whole sums received by them in respect of debts and matters in which they were professionally employed by the plaintiff soon after they received them. They denied concealment. They alleged that the plaintiff frequently, both orally and by letter, admitted and acknowledged to them our kind and generous behaviour towards himself, and the ability and industry with which they had conducted his business. That the plaintiff must have known that he could compel them to deliver their bill of costs; he often boasted of his knowledge of the law of England and Scotland, and resided in Edinburgh, where he was called a consulting Scotch agent. The plaintiff never demanded a bill of costs. They admitted that during the time they acted as his professional advisers the plaintiff was in pecuniary difficulty, and applied to them for temporary loans of small sums of money, which were invariably lent. They admitted that on or about the 2nd March, 1860,

1862.

O'BRIEN

v.

LEWIS.

Statement.

1862.
O'BRIEN
v.
LEWIS.

Statement.

Mr. Foulger, then acting on behalf of the plaintiff, repaid Mr. G. C. H. Lewis 30*l.* for advances made, but the sums advanced to the plaintiff by Mr. J. G. Lewis were not repaid except that he received the same out of the sum of 225*l.* received by the defendants in the suit of *Lord Conyers v. O'Brien*. That the sum of 55*l.* was returned after the defendants received the sum of 225*l.* With respect to the several matters arising out of the plaintiff's transactions with Sir Robert Jukes Clifton, stated in the 3rd paragraph of the bill, they denied that they, as plaintiff's solicitors, ever brought any action against Sir R. J. Clifton, but stated that Mr. T. Gill, acting for the plaintiff, brought such action to recover 406*l.* due from him on a bill of exchange to the plaintiff. The plaintiff had three bills of exchange of Sir R. J. Clifton for 1000*l.*, 640*l.*, and 360*l.* respectively, and endorsed to one H. Harrison, of Hart Street, who sued Sir R. J. Clifton, who in 1851 filed a bill against the plaintiff and Harrison charging that the plaintiff had obtained from him by fraud and misrepresentation bills of exchange for sums amounting in the whole to 200*l.* In this suit Sir R. J. Clifton employed Mr. J. Phineas Davis as his solicitor, and they (Messrs. Lewis), on a return in writing, acted as his solicitors and gave instructions to counsel for his answer. No answer was put in, the plaintiff having told Messrs. Lewis that he would do anything to avoid putting in an answer to the bill, and that he was most desirous to have the matter settled, and that if we could get the matter arranged by his giving up certain letters in his possession he would make us a present of 300*l.* besides paying us our fair bill of costs in the matter, for that there were certain letters which had passed between the parties that he was most anxious not to have disclosed, as being most damaging to the character and reputation of himself and Sir R. J. Clifton, and gave us copies of the correspondence. The answer then referred to an account in the handwriting of and

signed by the plaintiff and dated the 12th May, 1852, in which he only took credit for 500*l.* instead of 800*l.* which was paid by Mr. Davis for Sir R. J. Clifton, being the 800*l.* less the 300*l.* promised to be given by the plaintiff to Messrs. Lewis. The answer then set forth the circumstances under and the terms on which the suit of Sir R. J. Clifton against the plaintiff was stayed. The answer then stated that on Mr. Davis paying Messrs. Lewis the said sum of 800*l.* he told the plaintiff "he thought he had made a good bargain," to which the plaintiff replied "he might thank us [Messrs. Lewis] for it," though they [Messrs. Lewis] had made a good thing of it, as he had engaged to make them a present of 300*l.* out of the money paid by Sir R. J. Clifton; and the plaintiff, before leaving the house of Mr. J. G. Lewis, directed him, on behalf of his promise, to retain 300*l.* as a present, and to give him, the plaintiff, 50*l.* of the money just received on plaintiff's account, which he did. The answer alleged that the plaintiff never demanded any account, but in his own handwriting, as follows:—

1862.
O'BRIEN
v.
LEWIS.
—
Statement.

"MR. J. O'BRIEN IN ACCOUNT WITH THE MESSIEURS LEWIS.

<i>Dr.</i>				<i>Cr.</i>			
	£	s.	d.		£	s.	d.
April 8rd. <i>Rs</i> Kealy	182	0	0	<i>Rs</i> Clifton	500	0	0
" Self	50	0	0	Ditto ,	406	0	0
" 3rd. Gray	40	0	0	Ditto	100	0	0
" 10 Self	30	0	0	Interest upon the two			
" 12 Self	200	0	0	last sums	15	5	0
" Through Gen.					1021	5	0
Charretie	25	0	0		727	0	0
" Through Mr.							
Stevens	100	0	0				
" Bank Post-							
bill, dated							
May 11th	100	0	0				
	£727	0	0	Balance in my favour	£294	5	0

(Signed) "JOHN O'BRIEN.

"Paris, May 12, 1852."

1862.
 O'BRIEN
 v.
 LEWIS.
 —
Statement.

The defendants alleged that they did in the course of the year 1852 duly account for the balance in an account set forth in the answer. The answer then set forth at great length and particularly the circumstances under which the defendants were employed by the plaintiff.

Argument.
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Mr. *Bacon* and Mr. *Jessel* for the plaintiff.

The rule was now well settled that, except under circumstances which did not exist here, a solicitor could not take or receive a present from his client during the subsistence of the professional relation, or while the influence which the rule of law ascribed to a solicitor over his client was in force. This was now the settled rule of this Court, and every branch of the Court had acted on it. In this case there were also the additional circumstances that the client had been, during the time he employed the defendants, in pecuniary difficulties, and also that the money which he had alleged to have made a present of was never in his hands, but had been retained by the defendants. In all the cases where the plaintiff had failed in obtaining the relief prayed the rule was admitted.

In *Montesquieu v. Sandys* (a) the evidence failed, and the rule was dismissed without costs. In the *Marquis of Clanricarde v. Stenning* (b) the bill was dismissed without costs in consequence of the length of time that had elapsed. But in *Gresley v. Mousley* (c) relief was granted after the lapse of eighteen years. Under these circumstances it was submitted the plaintiff was entitled.

[*Lord Hardwicke v. Vernon* (d) was also cited.]

Mr. *Malins* and Mr. *Brooksbank* for the defendants.

(a) 18 Ves. 302.
 (b) 30 Beav. 175.

(c) 1 Giff. 450; s. c. 4 De G. &
 J. 78.
 (d) 4 Ves. 411.

It was not pretended in this case that there had been any fraud or concealment on the part of the defendants, or mistake or ignorance on the part of the plaintiff. This circumstance distinguished it from the other cases falling within the same general class. Neither had there been any complaint or remonstrance by the defendant during nine years, but on the contrary he had habitually drawn money as he required it from the defendants, and had himself furnished an account in his own handwriting, in which the retention of 300*L.* was never questioned. There had been *uberrima fides* on the part of the defendants.

Where this course of dealing with full knowledge has been acquiesced in during a long period, a gift by a client to his solicitor is not void, though undoubtedly it will be regarded with jealousy by this Court, and a satisfactory explanation required.

In *Hatch v. Hatch* (a) the Court set aside a gift from a ward to her guardian under the special circumstances of that case, but because the Court was not satisfied that it was made upon well-informed consideration, such as was abundantly proved here. In *Harris v. Lord Tre-menheere* (b) Lord Eldon, being satisfied that there had been no fraud or misrepresentation, said (c), "I cannot find any decision authorizing me to say that the defendant should not have taken the leases [the subject matter in dispute] as the pure gift of his employer;" and again he said, "There is no evidence of misrepresentation, circumvention, or any thing improperly leading the testator to make these leases." In that case Lord Eldon dismissed the bill impeaching the gift. This was in truth the doctrine on which this Court acted. In order to set aside a gift of this kind the Court must hold that the fairness of the transaction cannot be shown.

1862.
O'BRIEN
v.
LEWIS.
Argument.

(a) 9 Ves. 292.

(b) 15 Ves. 34.

(c) *Ib.* 39.

1862.
O'BRIEN
v.
LEWIS.
Argument.

In *Tomson v. Judge* (a) Vice-Chancellor Kindersley ignored the decision in *Harris v. Tremenhoe*, and relied on the language in *Hatch v. Hatch*.

[*Houghton v. Houghton* (b), *Cooke v. Lamotte* (c), *Holmes's Estate* (d), *Garrett v. Wilkinson* (e), were also cited.]

Judgment.

The VICE-CHANCELLOR:—

This suit has two objects [which are materially connected with each other. The question mainly argued has been the right of the defendants to retain the sum of 300*l.* as a gift or present, which they insist was properly made to them by the plaintiff as their client. The other question with which that is materially connected is as to the right of the plaintiff to an account of all the dealings and transactions between the defendants and himself during the time they acted as his solicitors. The plaintiff seems to me completely to have established his case upon both points. During the argument upon the question whether the defendants could insist upon the sum of 300*l.* as absolutely given to them by their client, the plaintiff, I took an opportunity of calling the attention of counsel to the decided cases, and to the rule which is so clearly laid down as to make it in my opinion impossible to sustain this transaction as a valid gift. It is nevertheless, after the many observations I have made upon the subject, needless to go more minutely into the circumstances which seem to me to make this gift invalid. It is enough to say now that it was a transaction alleged to have been a gift which took place during the subsistence in its fullest influence of the relation of solicitor and client. And although it is called a gift, it has this remarkable feature, that the money which was the subject of the transaction never was in the hands of the plaintiff

(a) 2 Drew. 414.
(b) 15 Beav. 278.
(c) 15 Beav. 234.

(d) 3 Giff. 337.
(e) 2 De G. & S. 244.

to give. The gift is said to have been made by a parol direction to the solicitors to retain it as a present.

After what has been so clearly laid down in this Court, it cannot be said that a mere parol direction of this kind, given during the subsistence of the relation between solicitor and client, can amount to such a gift or such an act of bounty as is not to be set aside, unless there is clear evidence of circumstances to remove that pressure which the Court always presumes where the relation of solicitor and client is proved to exist. Therefore, upon the question of the right of the plaintiff to have that sum of 300*l.* accounted for I have no doubt whatever.

With reference to the other question—the plaintiff's right to have an account of the dealings and transactions between him and the defendants—the case is equally clear in favour of the plaintiff. It has been contended that the account might be taken under a different jurisdiction, and that all that is here asked in a long and expensive suit might have been attained by a short petition at the Rolls. But it has never yet been held that that the summary jurisdiction at the Rolls excludes the right of a client to file his bill against his solicitor, and, where there have been pecuniary transactions between them, to have the account regularly taken between them by the Court under its general jurisdiction.

The plaintiff having succeeded upon both points, a great deal of time has been consumed in endeavouring to show that the conduct of the plaintiff has been such, and the conduct of the defendants towards him so liberal, and that the whole case is brought before the Court by the plaintiff under such circumstances, as that if the Court should make a decree in his favour it would not give him the costs of the litigation. Upon the question of costs I referred counsel to what was said by Lord Eldon in

1802.
O'BRIEN
v.
LEWIS.
Judgment.

1802.
O'BRIEN
v.
LEWIS.
—
Judgment.

the case of *Harris v. Lord Tremenheere*. In cases of this kind, where the Court has to decide whether the gift is valid, the Court acts upon the high ground of public policy, and although the transaction may have been as reasonable a one as ever was entered into, and although the motive for the gift may have been natural and proper, yet it has been held by all the greatest judges in this Court that upon the ground of public policy a gift under such circumstances shall not be permitted to stand. The question having to be disposed of upon the ground of public policy, the right to costs where the gift is set aside follows as a matter of course. I do not say that in some cases there may not be such extraordinary conduct in the course of the litigation, or in the mode of raising the question, as might induce the Court, in the exercise of that discretion which it always reserves to itself on the subject of costs, to make some modification of the strict rule that the defendant is in that case to pay the costs. But there is nothing in the present case to induce me to relax that rule which public policy requires to be observed, and the defendants must, therefore, pay the costs of the suit.

Decree for a general account, with a direction that the defendants in taking such account were not to be allowed to retain 300*l*.

1863.

PRICE v. LEY.

Dec. 11, 12,
13, 14, 15, and
Feb. 15.

IN July, 1861, the plaintiff, requiring a house on the south coast of Devonshire, ascertained that the defendant had a suitable house for sale called "The Hill," at Teignmouth, and caused a Mr. West to apply to the defendant to know whether he would let the house. In answer to such application the defendant sent to Mr. West the following letter:—

"The Hill,
"22nd July, 1861.

"Dear Sir,—It would not answer my purpose to let The Hill; I can only sell, and the lowest price is 2500*l*."

In consequence of this letter the plaintiff went to see the house, and some negotiation took place between him and the defendant about the price, the defendant refusing to take less, and telling the plaintiff that he had placed the house in the hands of a Mr. Cotton, who told him there would be no difficulty in getting 2500*l*. for it. Mr. West then obtained from Mr. Cotton's clerk a copy of an advertisement, which was in the following terms:—

"Teignmouth, South Devon.—To be sold, with immediate possession, a delightful freehold family residence, within one mile of the railway station, standing in about three and a half acres of ground, commanding most extensive sea and land views. The house contains double drawing-room, dining-room, library, eleven bedrooms, two dressing-rooms, kitchen, housekeeper's-room,

A vendor, being a lessee of a house with a right of purchase, agreed to sell the fee simple and inheritance for 2500*l*., and assigned his lease and contract to purchase to the purchaser, who by mistake covenanted to perform the covenants in the lease. It appearing that one-fourth of the property was leasehold, and the vendor having brought an action for the purchase-money—On bill filed by the purchaser, the Court set aside the contract.

On a bill to set aside a written instrument on the ground of mistake or surprise, parol evidence is admissible to show that such instrument is contrary to the real terms of the contract, and that it ought to be set aside.

1863.
 PRICE
 v.
 LEX.
 —
Statement.

pantry, and all necessary domestic offices; three-stalled stable, double and single carriage-houses, harness-room, laundry, and loft over; good vinery and garden: additional land can be rented.—Apply to Mr. W. Cotton, House Agent, Teignmouth.”

The plaintiff, in the belief that the property was freehold, on the 31st July, 1861, wrote to the solicitors of his trustees the following letter:—

“I saw the other day a house at Teignmouth which would suit me, but it is for sale, and not to be let. I suppose, with the consent of our trustees, there would be no particular difficulty in altering the investment of a portion of the trust money from India Five per Cents to a freehold house, stone-built and modern? I am told the title is good and simple. A line by return of post will much oblige

“Yours very truly,

“FOWLER B. PRICE.”

The solicitor of the plaintiff's trustees having informed the plaintiff that the trustees would advance the money, the plaintiff wrote to Mr. Cotton, agreeing to purchase the house at the sum of 2500*l.*, in reply to which Mr. Cotton begged the plaintiff to meet the defendant at the Queen's Hotel on the 6th August, in order to settle the terms of the purchase.

The 5th, 6th, and 7th paragraphs of the bill were in the following terms:—

“About this time the plaintiff was informed by the defendant and first learnt that the defendant was not actually seized of the freehold of the house, but that he had only a lease or an agreement for a lease of it for a short term of years, with power to buy and require a conveyance of the freehold from his lessor, Mr. William

Pearce Blake, at any time during the term. The defendant, however, represented himself to the plaintiff as being in equity the freeholder, and as being able and as intending to obtain from Blake, and to convey to the plaintiff, the legal fee simple of the property, and the plaintiff entered into and continued and carried on negotiations with the defendant on the faith of the defendant's said representations, and on the basis of an understanding that the plaintiff was dealing with the defendant for the purchase, from the defendant alone, of the fee simple of the property, and the defendant (believing at that time that Mr. Blake had, and that the defendant could readily acquire from him, a good title to the fee simple) dealt with the plaintiff on the basis of the said understanding, and on no other basis.

"The plaintiff and the defendant negotiated with each other for the purchase by the plaintiff and the sale by the defendant of the fee simple of the property at the price of 2500*l.*, to be paid wholly to the defendant, and it never was the intention of either of them that the plaintiff should buy for 500*l.*, or for any other sum, merely the defendant's rights under his lease, or that the plaintiff should be compelled to have any dealings whatever with Mr. Blake. The plaintiff never would have entered knowingly into any contract with the defendant for the purchase merely of the defendant's interest under his lease or agreement, or for the purchase of anything less than the absolute fee simple with a marketable title, and such as trustees ought to accept, and no proposal was ever made by the plaintiff or the defendant prior to the signing of the agreement of the 6th of August, 1861, hereinafter set forth, that the plaintiff should pay the defendant 500*l.* or any other sum for the lease, or that the plaintiff should buy the freehold from Blake for 2000*l.*, or any other sum.

"On the 6th of August, 1861, the plaintiff met the

1863.
PRICE
v.
LEY.
—
Statement.

1863.
PRICE
v.
LEY.
—
Statement.

defendant and Mr. Cotton at the Queen's Hotel aforesaid, Mr. William Pearce Blake (with whom the plaintiff had never before had any communication) being present at the meeting. Cotton produced the written agreement for sale, and handed it to the plaintiff; and the plaintiff, who had no legal adviser present, having satisfied himself that the amount of the purchase-money was correctly stated, signed the agreement without reading it throughout, in the full belief that it expressed accurately the understanding and intentions of the plaintiff and defendant, as mentioned in the 5th and 6th paragraphs of this bill, and that it did not contain anything contrary to such understanding and intentions. The defendant also signed another part of the said written agreement.

The agreement was in the following terms:—

“ Articles of Agreement made this 6th day of August, 1861, between James Peard Ley, of the Hill, Teignmouth, in the County of Devon, Esquire, of the one part, and Fowler Boyd Price, of Farway, Honiton, of the other part; whereas, by Articles of Agreement dated the 13th day of April, 1860, and made between William Pearce Blake, of Ottery Saint Mary, in the County of Devon, of the one part, and the said James Peard Ley of the other part, it was agreed as follows (that is to say):— The said William Pearce Blake agreed to let, and the said James Peard Ley agreed to take, all that messuage or dwelling-house called the Hill, with the lawn, shrubbery, garden, greenhouse, coach-house, and stable yards thereunto belonging, and other the hereditaments then held and enjoyed therewith, situate in Woodway Road, in the Parish of East Teignmouth, in the said County of Devon, and then late in the occupation of William Ernest de Veulle, together with the appurtenances thereunto belonging and appertaining, for the term of seven years, to be computed from the 9th day of May, 1860, at the yearly rent of 100*l.*, payable quarterly, on the 9th day

of August, the 9th day of November, the 9th day of February, and the 9th day of May in every year, the first of such quarterly payments to be made on the 9th day of August then next; that the said William Pearce Blake, his heirs or assigns, would on or before the 9th day of May then next execute a lease, if required, of the said dwelling-house, hereditaments, and premises to the said James Peard Ley, his executors, administrators, or assigns, for the term and at the rent aforesaid, to be payable as aforesaid. That in the said lease, to be granted as aforesaid, should be contained covenants on the part of the said James Peard Ley, his executors, administrators, and assigns, to pay the said yearly rent as the same should become due (save and except so long as the said premises should become uninhabitable by reason of accidental fire). And also all present and future taxes, rates, assessments, and other outgoings whatsoever in respect of the said premises (except land-tax and chief rent, and landlord's property tax). And also (except in case of fire, storm, or tempest) to well and substantially repair, and keep in repair, at his or their own expense, during the said term, all and every part of the said dwelling-house, buildings, and premises so agreed to be demised, together with the glass and other windows and fixtures thereunto belonging, and all buildings, fixtures, improvements, and additions whatsoever to be made during the term, external repairs only excepted. And also not to underlet, assign, or part with the possession of the said premises, or any of them, during the said term of seven years, without the licence or consent in writing of the said William Pearce Blake, his heirs or assigns, first obtained; nor do, or suffer to be done, any act whatsoever for increasing the rate of insurance of the said premises; nor carry on, or permit to be carried on, on the said premises any trade or business whatsoever, but use and occupy the same as a private dwelling-house, nor permit any waste on the said pre-

1863.

PRICE

V.

LEY.

Statement.

1863.
PRICE
v.
LEY.
—
Statement.

mises; and at the end or sooner determination of the term quietly to yield and deliver up possession to the said William Pearce Blake, his heirs and assigns, of the said dwelling-house and premises agreed to be demised; and all future erections or additions to or upon the same, together with all the fixtures in good substantial and tenantable repair and condition in all respects (reasonable use and wear thereof only excepted). And that in the said lease so to be granted as aforesaid should be contained a condition authorizing the re-entry of the said William Pearce Blake, his heirs or assigns, into the said premises, on nonpayment of the said yearly rent, or any part thereof, for the space of twenty-one days; or in case the said James Peard Ley, his executors or administrators, should become an insolvent debtor, or compound with his or their creditors, or should make any assignment for the benefit of his or their creditors, or on breach of all or any of the covenants so to be contained, on the part of the said James Peard Ley, his executors, administrators, and assigns, in the said lease agreed to be granted as aforesaid. And that in the said lease should also be contained a covenant, on the part of the said William Pearce Blake, that in case the said James Peard Ley, his executors or administrators, shall, at any time during the said term of seven years, be desirous of purchasing the interest of the said William Pearce Blake, or his heirs, in the said dwelling-house, hereditaments, and premises so agreed to be demised, then the said William Pearce Blake, his heirs or assigns, would take for the purchase thereof the sum of 2000*l.*, and would upon payment of the same sum, at the costs and charges of the person or persons requiring the same, convey and assure the freehold and inheritance in fee simple expectant on the determination of the said term of seven years, in the same hereditaments and premises, unto the person or persons so paying the said sum of 2000*l.*, and his, her, or their heirs and assigns, or as

he, she, or they should direct. And the said James Peard Ley, for himself, his heirs, executors, and administrators, thereby agreed with the said William Pearce Blake, his heirs and assigns, to accept such lease on the terms and conditions as aforesaid, and execute a counterpart thereof when required. Now, each of them the said James Peard Ley and Fowler Boyd Price, so far as relates to the acts and deeds on his part to be performed hereby for himself, his heirs, executors, and administrators, agrees with the other of them as follows (that is to say): The said James Peard Ley shall sell, and the said Fowler Boyd Price shall purchase at the sum of 2500*l.*, to be paid to the said James Peard Ley immediately after the execution of these presents, the benefit of the said agreement, and of all covenants, agreements, and stipulations therein entered into with the said James Peard Ley, and of all the remedies to be taken and pursued by virtue thereof; that the said James Peard Ley shall, at the expense of the said Fowler Boyd Price, do all necessary acts for causing the said William Pearce Blake to grant to the said Fowler Boyd Price the lease in and by the said agreement contained to be granted to the said James Peard Ley; that, in consideration of the premises, the said Fowler Boyd Price shall perform all the covenants and stipulations, on the part of the said James Peard Ley, contained in the said agreement, and shall at all times indemnify him, his heirs, executors, and administrators, and his and their estate and effects, from all actions, suits, damages, and expenses, by reason of his the said James Peard Ley's non-performance thereof respectively."

The nature of the defendant's interest was correctly set out in the agreement. At the foot of that part of the agreement which was signed by the plaintiff, there was written in pencil by Cotton a receipt for 250*l.*, as a deposit of 10 per cent. on the purchase-money of 2500*l.*, but the plaintiff objected to pay any deposit until the title

1868.
PRICH
v.
LEY.
—
Statements.

1863.
PRICE
v.
LEY.

Statement.

should be approved of by his solicitor. Cotton then referred to the defendant, who waived the claim for a deposit.

The 11th paragraph of the bill was as follows:—

At the time of the said written agreement being signed as aforesaid some conversation took place between the plaintiff and defendant as to the person by whom the house should be conveyed to the plaintiff. The defendant proposed that Blake should convey the freehold directly to the plaintiff, instead of to the defendant, and on the plaintiff's suggesting that, possibly Blake might refuse to convey the house to the plaintiff, the defendant replied, "That would not matter to you, as I should then make him convey to me by the power contained in my lease, and I would convey to you. It would entail the expense of an extra conveyance, but that would fall upon me." Ultimately the defendant came to some private arrangement with Blake, under which Blake agreed that, in order to save expense, his solicitors, Messrs. Geare, Mountford, & Geare, of Exeter, should, on the defendant's behalf, furnish the necessary abstract of the title direct to the plaintiff's solicitors, and should on the defendant's behalf act as the vendor's solicitors, and that Blake would, on receiving 2000*l.* from the plaintiff, convey the fee simple to the plaintiff. The plaintiff had nothing whatever to do with the making of this private arrangement, beyond consenting at the defendant's request that, upon a good title being shown, and a conveyance of the fee simple being made to him by Blake, he would pay 2000*l.* of this purchase-money to Blake, and 500*l.*, the balance thereof, to the defendant.

Shortly after the agreement had been signed the plaintiff sent a copy of it to his solicitors, Messrs. Bothamley & Freeman, who were also the solicitors for the trustees of his marriage settlement, when they ascertained that the written instrument did not carry into

effect the intention of the parties. They immediately informed the plaintiff, who by their letter first became aware of the fact, and they also wrote to the defendant's solicitors the following letter :—

1863.
PRICE
v.
LEY.
—
Statement.

“ 39, Coleman Street,

“ 10th August, 1861.

“ Our client, Mr. F. B. Price, has forwarded to us an agreement for purchase of premises at Teignmouth. The agreement is not correct. Mr. Price is to pay 2000*l.* to Mr. Blake, and 500*l.* to Mr. Ley; but by this agreement he contracts to pay Mr. Ley 2500*l.* for the benefit of the agreement with M. Blake. This is clearly an oversight, which we shall be glad to have corrected at once.”

In answer the defendant's solicitors wrote on the 12th August as follows :—

“ We have not seen this agreement. Mr. Blake is to receive 2000*l.*, his purchase-money under a contract dated 13th April, 1860. Mr. Blake informed us that he was to receive 250*l.* now as a deposit, and in part payment of his purchase-money.”

On the 27th of August the defendant, in reply to a letter from the plaintiff, wrote to the plaintiff in the following terms :—

“ Some time since my brother wrote to me for the agreement, as he said there was a mistake in the one which your solicitors showed, which I certainly did not remark until I heard from my brother, when I saw you had agreed to pay me 2500*l.* for my interest immediately on the signing of the agreement instead of 500*l.*, so I sent it up to be altered; but I have not heard from my brother, who is now at Ilfracombe. I did not

1863.

PRICH

v.

LEY.

Statement.

read over the agreement before I signed it, but concluded that as you and Cotton had done so it must be all right; and I also in the same letter wrote to know if he would take the hurdles and greenhouse plants, and on the 29th of the same month received from the plaintiff the letter now produced and shown to me, and marked H.; and the plaintiff never replied to or noticed that part of my said letter of the 27th August relating to the mistake in the said agreement between us."

The 15th paragraph of the plaintiff's bill was as follows:—

The plaintiff, having been as aforesaid informed by his solicitors of the said mistake in the written agreement of the 6th of August, 1861, met the defendant by appointment in Exeter on the 29th of August, 1861, and called his attention to it. The defendant said at once that Cotton had made a great mistake. The plaintiff replied, "Though there has been a mistake in the written agreement, our intentions are unmistakable. I look to you and to you only for a good title to the property. The arrangement between Blake and you was a private one between you two, to save the expense of a double conveyance, but I have nothing to do with it." The defendant assented to the plaintiff's statement, and inquired when the plaintiff would take possession of the house, to which the plaintiff replied "that he would take possession as soon as his solicitors advised him that his title was good."

The abstract was subsequently delivered, when it appeared that assuming Mr. Blake's title to three fourth parts of the premises to be good he had only a leasehold interest in the remaining one fourth part. The objection having been taken, and both Mr. Blake and the defendant having unsuccessfully attempted to cure it, the plaintiff on the 31st October, 1861, gave the defendant

notice that unless a good title should be shown within one month he should rescind the contract. The defendant having failed to remedy the defect, on the 6th December the plaintiff gave the defendant notice that the contract was rescinded and that he would not proceed further with it.

The defendant thereupon brought an action, claiming in his declaration 600*l.*, and furnishing the following particulars of demand:—

1863.
PRICE
v.
LEY.
—
Statement.

	£	s.	d.
" 1861. August 6.			
Purchase-money for sale of the benefit of an agreement relating to The Hill, Teignmouth	500	0	0
One quarter's rent for the said premises, due 9th November, 1861, and paid by plaintiff	25	0	0
Wages paid John Horrell, the gardener, at defendant's request, seventeen weeks, from 1st September to 29th December, 1861, at 18 <i>s.</i> a-week	15	6	0
To plants (as per list and valuation) sold and delivered by plaintiff to defendant	16	3	6
	<u>£556</u>	<u>9</u>	<u>6</u>

" And the plaintiff will seek also to recover these sums under the money counts. And, take notice, that the purchase money sought to be recovered under the first count is the sum of 500*l.* only, the sum of 2500*l.* having been inserted in the agreement by mistake, instead of the said sum of 500*l.*"

The plaintiff appeared to the action, and pleaded legal and equitable pleas, to which the defendant demurred, and the demurrers were allowed on the points of law. The bill alleged that the plaintiff was advised that he could have no adequate protection at law, and withdrew the plea.

1863.
PRICE
v.
LEY.
—
Statement.

The bill alleged that the plaintiff never agreed to pay the wages of the defendant's gardener, and only agreed to take the plants provided the purchase of the house was completed, or to pay rent for the house except so far as the written agreement contained such stipulation. There was in truth and equity nothing due from the plaintiff.

The 23rd, 24th, and 25th paragraphs of the bill were as follows:—

“ The written agreement of the 6th of August, 1861, was entered into and executed by the plaintiff under the circumstances and with the intention hereinbefore stated, and not otherwise. The plaintiff's only object in entering into it was that he might obtain a conveyance of the fee simple at the price of 2500*l.*, and it never was intended, either by the plaintiff or by the defendant, that the plaintiff should pay the defendant 500*l.* or any other sum merely for the defendant's equitable right to have a lease from Blake, or that the plaintiff should pay either to the defendant or to Blake any money at all until a good title had been shown and a valid conveyance had been made to him of the fee simple of the premises.

“ The defendant and Blake have not, nor has either of them, and they cannot, nor can either of them, make or acquire a good title to the fee simple of the premises; and, therefore, even if the plaintiff were to take a lease of the premises from Blake, he would be unable to acquire the fee simple, and would not receive the consideration he bargained for, or a sufficient consideration for the 500*l.* or any other money he might pay the defendant under the agreement; and if the agreement were reformed according to the true intention of the parties as hereinbefore stated the defendant would be unable specifically to perform the same.

“ The plaintiff has incurred heavy costs and expenses in relation to the said agreement of the 6th August, 1861, and to the said action, and he has been put to great

expense in providing himself with a residence instead of that which the defendant agreed to sell him, and he has been otherwise injured by the failure of the defendant to convey or procure a conveyance to him of the freehold of the said house and premises agreed to be sold.

1863.
PRICE
v.
LEY.
Statement.

The bill prayed as follows—

That the said written agreement of the 6th of August, 1861, may be declared null and void and no longer binding on the plaintiff or defendant, and that it may be delivered up to be cancelled.

If the Court shall be of opinion that the said agreement is not null and void, or ought not to be cancelled, then that the said agreement may be reformed in accordance with the true intent and meaning of the parties, and that it may thereby be made an agreement by the defendant to sell and by the plaintiff to buy the fee simple in possession of the said house and premises at the price of 2500*l.*, on a good title thereto and conveyance thereof being made within a reasonable time, and that a specific performance may be decreed of the agreement so reformed.

The bill also prayed for an injunction.

The defendant in the 14th and 15th paragraphs of his affidavit alleged as follows :—

14. No private understanding was come to between me and the said Mr. Blake on or after signing the said agreement of the 6th day of August last, but after the same was signed the plaintiff asked for the names of the said Mr. Blake's solicitors, and was informed by him they were Messrs. Geare & Co., of Exeter.

15. I deny that the plaintiff on the 29th day of August last called my attention to the mistake in the agreement as alleged in the 12th paragraph of his said affidavit, or that I have admitted there was any mistake therein, except the insertion of the sum of 2500*l.* instead of 500*l.*; but I say that, though I had written to the

1863.

PRICE

v.

LEY.

Statement.

plaintiff on the 27th day of August last offering to amend the said agreement as before stated, the defendant neither in writing nor verbally to me ever alluded in any way to the said mistake, and I therefore supposed my offer to amend was satisfactory to him, and I have not since seen or heard from him.

Argument.

Mr. Malins and Mr. T. Wright for the plaintiff.

It is quite clear the written instrument fails to express the intention, which was, that the plaintiff should purchase the estate for 2500*l*. There was no stipulation as to title, and the purchaser was therefore entitled to have a good title made to the property: *Ogilvie v. Foljambe* (a): and, therefore, even admitting the contract was binding, it must be rescinded on the question of title: *Broome v. Monk* (b). Here the real agreement was perfectly clear, that the plaintiff should purchase the fee simple and inheritance of the property; but where a plaintiff has contracted for the freehold he cannot be compelled to take a term of years instead, however long: *Drewe v. Corp* (c): or a copyhold: *Ayles v. Cox* (d): nor, having contracted for the entirety, to take undivided parts of the estate: *Dalby v. Pullen* (e). In *West v. Jones* (f) Lord Cranworth said, (g) even where a misrepresentation is made in the most entire good faith, if it be made in order to induce another to act upon it, or under circumstances in which the party making it may reasonably suppose it will be acted on, then *prima facie* the party making the representation is bound by it as between himself and those he has thus misled. [*The Attorney-General v. Stephens* (h) was also cited.]

(a) 3 Mer. 53.

(b) 10 Ves. 597, 606.

(c) 9 Ves. 368.

(d) 16 Beav. 23.

(e) 3 Sim. 29; s. c. 1 R. & M. 298.

(f) 1 Sim. N. S. 205.

(g) Ibid. 208.

(h) 1 K. & J. 724.

Mr. Southgate, in the absence of Mr. Bacon, for the defendant.

The bill really asks to set aside the Statute of Frauds, by introducing a term in the agreement that Blake should make a good title. This was no part of the original agreement, and could not be added: *The Marquis of Townshend v. Stangroom* (a), *Woollam v. Stearn* (b).

In *Davies v. Fitton* (c) Lord Chancellor Sugden laid it down clearly (d) that the Court could not decree specific performance of an agreement with a variation of a term, and, by parity of reasoning, it could not add a term in order to make the agreement impossible to perform. Again: this Court could not, consistently with the Statute of Frauds, rectify an existing contract for the sale of land, and carry it into execution when rectified, even though the mistake was admitted [by the answer: *Attorney-General v. Sitwell* (e)].

[*Martin v. Pycroft* (f); *London and Birmingham Railway Company v. Winter* (g); *Bartlett v. Salmon* (h); and *Sugden V. & P.*, 204 (Ed. 13), were also cited.]

Mr. Bacon on the same side.

There is a clear distinction between fraud and mistake. In this case it was admitted that there was no fraud. Then, was there any mistake to entitle the plaintiff to have this agreement set aside? The only mistake was, that 2500*l.* was mentioned as the purchase-money instead of 500*l.* This cannot entitle the plaintiff to relief in this Court. The plaintiff is not entitled to relief in equity; he does not seek specific performance. He does not ask for 2500*l.*; but the plaintiff asks the Court to declare that he has not entered into any agreement whatever.

1868.

PRICE

v.

LEY.

Argument.

(a) 6 Ves. 328.

(b) 7 Ves. 211.

(c) 2 Dr. & W. 225.

(d) Ibid. 232.

(e) 1 Y. & Coll. (Ex.) 559.

(f) 2 De G. M. & G. 785.

(g) Craig. & P. 57.

(h) 6 De G. M. & G. 33.

1863.
 PRICE
 v.
 LEY.
 —
Argument.

The plaintiff's case is, that the erroneous insertion of a sum is to make an agreement void, though the defendant does not seek to profit by the mistake. Upon the terms of the agreement the plaintiff reserved to himself the right either to buy the fee or not. But upon a contract to purchase an agreement for a lease, which was this agreement, there is no implied condition that the lessor shall make a good title: *Kintrea v. Persten* (a). The plaintiff really purchased the benefit of the defendant's agreement. On that point the agreement is quite clear.

Mr. *Malins* in reply.

The defendant is attempting to force on the plaintiff a lease for five years at a rack-rent, at a premium of 500*l*. The defendant brought Blake to meet the plaintiff, and thereby gave him notice of the plaintiff's intention to buy the freehold. No doubt, the contract ultimately signed was originally prepared with a view of selling the lease; but the defendant, finding a difficulty in so selling, changed his plan and advertised the freehold for sale. As to the difference between the sums of 2500*l*. and 500*l*., it was a simple question of apportionment between Ley and Blake, with which the plaintiff had nothing to do. The letter of the plaintiff to Cotton of the 3rd August concluded the negotiation, and the agreement of the 6th August was merely to put that letter into formal terms. There was no intention of entering into a new contract. The first suggestion about a contract for 500*l*. came on the 12th October, 1861.

It was submitted, therefore, that the plaintiff was entitled to a decree.

Judgment. The VICE-CHANCELLOR:—

In this case the bill prays that the agreement in writing of the 6th August, 1861, may be declared null and void.

The alternative in the prayer, which seeks to have the written agreement reformed, seems wholly unsustainable. At the date of the agreement it appears that the defendant had no other title to the house and grounds which were the subject of it than an agreement with a Mr. Blake for a lease, which was to contain a covenant by Blake to sell to the defendant, if he should desire it, the fee simple and inheritance for the sum of 2000*l*. According to the written agreement between the plaintiff and the defendant it is very clearly expressed that the plaintiff agreed to pay to the defendant the sum of 2500*l*. for the mere benefit of the defendant's agreement with Blake.

1863.
PRICE
v.
LEY.
—
Judgment.

But the defendant does not now insist on a right to receive the whole 2500*l*., which, according to the clear language of the agreement, ought to be paid to him. He only demands 500*l*. as due to him under the agreement. On the other hand the plaintiff says that what he agreed to purchase from the defendant, and what the defendant agreed to sell, was the fee simple and inheritance for the price of 2500*l*. This, therefore, is a case in which both parties seek to depart from the exact terms of the written agreement.

For the defendant it has been argued that parol evidence is not admissible in a suit to rescind a written agreement in any case except where relief is sought on the ground of fraud. But it is clearly established that where relief is sought on the ground of mistake or surprise, parol evidence is admissible to prove that the written agreement is contrary to the real terms of the contract, and therefore that the written agreement ought to be rescinded.

In the case of *Calverly v. Williams (a)*, Lord Thurlow held that if it were proved that one party thought he had purchased *bonâ fide* what the other thought he had not sold, it was a ground to set aside the contract.

(a) 1 Ves. 211.

1863.
PRICE
v.
LEY.
Judgment.

And Sir Thomas Plumer, in the case of *Clowes v. Higginson* (a), speaking of Lord Thurlow's opinion on this point, states also, as the view of Sir William Grant, that the consequence of such a mistake would be that in reality there was no agreement, but, the parties misunderstanding each other, the one proposing to buy one thing, the other to sell another, a contract so framed in mistake cannot consistently with justice be executed.

In the present case the mistake is proved as clearly by the evidence of the defendant as by that of the plaintiff. There is set forth in the defendant's affidavit the contents of his own letter to the plaintiff of the 24th August, 1861, in which he says, "Some time since my brother wrote to me for the agreement, as he said there was a mistake in the one which your solicitors showed, which I certainly did not remark until I heard from my brother, where I saw you had agreed to pay me 2500*l.* for my interest immediately on the signing the agreement, instead of 500*l.* ; so I sent it up to be altered." It therefore appears that the defendant himself admitted that there had been a mistake in the written agreement.

On the part of the plaintiff the evidence proves that the written agreement contains a mistake as to the subject matter of the contract. By the plaintiff's letter of the 3rd August he distinctly offered to buy the freehold and inheritance for the sum of 2500*l.* The meeting of the 6th August, at which the written contract was signed, took place on the acceptance of this offer. There is no evidence on either side of any treaty or offer by the defendant to sell to the plaintiff for 500*l.* the benefit of his agreement with Blake. Through the whole negotiation the treaty was for the purchase and sale of the freehold and fee simple. The advertisement by the defendant's agent for the sale of the property described it as freehold. This, therefore, is a case in which the mistake in the written contract is proved by irrefragable

evidence. By this mistake the contract is vitiated and ought to be set aside. All the arguments for the defendants founded on cases where the bill prayed for specific performance, are wholly inapplicable to the question in this cause.

1863.
PRICE
v.
LEY.
Judgment.

In the case of *Martin v. Pycroft* (a) there was a complete agreement in writing for granting a lease for a term certain at a certain rent, and with certain covenants. The decision of the Court of Appeal proceeded on the ground that an agreement by parol to pay 200*l.* as a premium for such a lease was no ground for refusing specific performance of the written agreement for the lease, where the plaintiff submitted by his bill to pay the 200*l.* That case introduced no new principle as to the admissibility of parol evidence, and it has no application to the jurisdiction of this Court to set aside an agreement on the ground of mistake, or fraud, or surprise. To sanction the right to set aside an agreement on any of those grounds parol evidence is in most cases essential. But where specific performance is asked the Court has a discretion which is not permitted where it is called upon to set aside an instrument on the ground of mistake, or fraud, or surprise.

As the plaintiff has in this case proved by unquestionable evidence that there is a mistake in essential parts of the written agreement, he is entitled to a decree to have it set aside. It is necessary that the decree should also deal with the judgment which, under the authority of this Court, was given by the plaintiff in the action at law. It is needless to inquire whether the plaintiff could or could not have sustained his equitable plea in the action at law. As the jurisdiction upon the equitable question was properly transferred to this Court, and the agreement is here set aside, the proper course seems to be to direct that satisfaction be entered on the judgment, and that the defendant pay to

(a) 2 De G. M. & G. 785.

1863.

PRICE

v.

LEY.

Judgment.

the plaintiff his costs of this suit and of the motion, so far as the costs at law have not been already disposed of by the court of law. The first part of the decree must declare that the memorandum of agreement of 6th August, 1861, is not valid and binding, and ought to be set aside: and decree the same accordingly.

1862.

Dec. 9.

Where the draft of a proposed settlement in contemplation of the marriage of an infant ward of Court containing a covenant to settle after-acquired property, but no provision as to a second marriage, was approved by the intended husband but never executed, though a post-nuptial settlement in different terms was executed, the Court varied the latter settlement by adding the covenant as to after-acquired property.

Re HOARE'S TRUSTS.

TRUSTEE RELIEF ACTS.

BY an order made on the application of Sir J. H. Lethbridge, the dividends of certain property bequeathed to his children were ordered to be paid to him for their maintenance and education during their minorities, or until further order.

This order was relied on as constituting the children wards of Court.

The share in the trust funds belonging to Julia, one of the infant daughters, consisted of 215*l.* 18*s.* 3*d.* Bank Annuities and a small sum of cash.

On the 28th January, 1860, Major H. Walker, who was about to marry Miss Julia Lethbridge, at the request of Sir John Lethbridge wrote to his solicitors begging that they would make arrangements for settling the money belonging to the lady conjointly on her and himself. On the 21st February, 1860, a draft settlement containing the following covenant for the settlement of the lady's subsequently-acquired property was sent to Major Walker:—And it is hereby agreed and declared that if

the said Julia Decima Lethbridge now is, and if after the said intended coverture she or the said Hercules Walker in her right shall become seised, possessed, or entitled to any real or personal estate of the value of 200*l.* or upwards for any estate or interest whatsoever," except jewels, &c., which it was thereby agreed and declared should belong to the said Julia D. Lethbridge for her separate use, "then and in every such case the said Hercules Walker and Julia Decima Lethbridge, and all other necessary parties, shall at the costs of the trust premises, as soon as circumstances will permit, and to the satisfaction of the trustees or trustee hereof, convey, assign, and assure the said real and personal property to, or otherwise cause the same to be invested in the said trustees or trustee hereof," upon the trusts therein declared.

On the 9th March, 1860, Major Walker returned the draft without having raised any objection. The marriage was solemnised from the house of Sir J. Lethbridge on the 15th March, 1860, with the consent of Sir J. Lethbridge, the young lady being then eighteen years of age, but no settlement was executed on that occasion. Shortly afterwards Major Walker requested the trustees to transfer the funds into his wife's name, but they refused on the ground that Sir J. Lethbridge had consented to the marriage on the faith of the settlement which had been approved. In the May subsequent the trustees paid the fund into court, under the provisions of the Trust Relief Act.

On the 7th February, 1861, a post-nuptial settlement of the sum of 2159*l.* 18*s.* 3*d.* stock was executed by Major Walker. It contained the ordinary provisions for the settlement of personalty on marriage, but made no provision for the children of Mrs. Walker by any future husband; neither did it contain a covenant by Major Walker to settle his wife's after-acquired property.

1863.
Re HOARE'S
TRUSTS.
TRUSTEE
RELIEF ACTS
Statement.

1863.

Re HOARE'S
TRUSTS.TRUSTEE
RELINQUISHES.*Statement.*

Major and Mrs. Walker and the trustees then presented a petition, praying for payment out of court to the trustees of the above sum of stock.

Upon that petition coming on, on the 1st March, 1861, an order was made directing the chief clerk to inquire whether any and what settlement of the fortune of the infant had been made, and if so, whether according to any and what antenuptial agreement for a settlement, and whether any and what further or other settlement ought to be made.

On the 10th July, 1862, the chief clerk certified that the post-nuptial settlement of the 7th February, 1861, had been executed by Major Walker and the trustees, which comprised the fund in court, and the other property of the lady, which was reversionary; that there had been no ante-nuptial agreement for a settlement; that Mrs. Walker was entitled to certain legacies, and to a sum of money as one of the next of kin of a lady deceased; and that "a further settlement ought to be made of the property comprised in the settlement of the 7th February, 1861, and of all other the real and personal property of or to which Mrs. Walker, at the time of her marriage, was seised, possessed, or entitled, and of any property, either real or personal, of which she, or Major Walker in her right, might, at any time during coverture, become seised, possessed, or entitled, of the value of 200*l.* or upwards, and that such settlement should include therein the children of Mrs. Walker by any future husband, as well as the children of the existing marriage, and to be in such form as should be approved by the Court."

Sir John Lethbridge, who had liberty to attend the proceedings in chambers, now moved to vary the certificate, by striking out the words, "there was not any antenuptial agreement for a settlement," and substituting, "there was an ante-nuptial agreement for settling all the property of the said Julia Decima Walker."

Major Walker and his wife also moved to vary the

certificate, by striking out that part of the certificate which found that a further settlement ought to be made of the wife's property, and substituting for those words that no further settlement ought to be made thereof.

1868.
Re HOARE'S
TRUSTS.
TRUSTEE
RELINQUISHES.
Argument.

Mr. *Craig* and Mr. *Hoare* appeared for the trustees.

Mr. *Malins* and Mr. *Piggott*, for Major Walker, submitted that there had been no ante-nuptial agreement on the part of the husband to execute any settlement, and therefore, to that extent, the certificate was wrong. A post-nuptial settlement executed in the absence of any ante-nuptial agreement would be voluntary, and therefore void against creditors. In *Warden v. Jones* (a), affirmed on appeal (b), it was held that, where even there had been a parol agreement for a settlement, a settlement of the wife's property in pursuance of such agreement was voluntary, and void against the husband's creditors.

There was a distinction between cases where the money the property of the wife was in court to the credit of the infant *before* the marriage, and those cases where it was paid in *after* the marriage, as here: where the money is in court the infant remains under the care of this Court even after she attains twenty-one: *Austen v. Halsey* (c).

In the absence of any agreement to the contrary the ultimate trust ought to be in favour of the husband: *Carter v. Taggart* (d) overruling the decision of Vice-Chancellor Parker (e).

Mr. *Bacon* and Mr. *Springall Thompson* for Sir J. H. Lethbridge.

It was quite clear this lady was a ward of court: *Re Hodges Settlement* (f), *Ex parte Starkie* (g), and the fact

(a) 23 Beav. 487.

(b) 2 De G. & J. 76.

(c) 2 S. & S. 123, note.

(d) 1 De G. M. & G. 286.

(e) 5 De G. & S. 49; see also

Gent v. Harris, 10 Hare, 383.

(f) 3 K. & J. 213.

(g) 3 Sim. 339.

1863.
Re HOARE'S
 TRUSTS.
 TRUSTEE
 RELIEF ACTS.
 Argument.

that her father was living did not interfere with the jurisdiction of the Court: *Butler v. Freeman* (a). The filing of a bill on behalf of an infant is enough to make the infant a ward of court; because the Court would then see that a proper settlement was made.

Suppose even that no agreement had in fact been entered into, still the Court would insist that the husband should execute a proper settlement: *Martin v. Foster* (b); but a proper settlement would necessitate a provision for settling the after-acquired property of the wife, and a provision for the children of a second marriage.

Judgment.

The VICE-CHANCELLOR:—

As to the provision in the case of a second marriage, I do not think it can be maintained. The marriage was contracted by the husband on the faith of the draft agreement, and by that he is bound, but no further.

This case comes within the principle laid down in *Long v. Long* (c), by Sir John Leach, and in *Austen v. Halsey* by Lord Eldon, and upon that principle the Court is bound to secure the interest of this lady.

In *Long v. Long* the Court went further than it is necessary to go in this case, because in this case the marriage having taken place on the faith of the settlement which was prepared in draft and approved by the intended husband, it is not necessary that the Court should require any provision to be added to the settlement as to the children of a future marriage. In this respect, therefore, the settlement executed will not be varied. The order, therefore, will be made on the motion to vary the chief clerk's certificate.

The chief clerk was right in finding that there was no agreement for a settlement, because the marriage took place after the draft settlement had been shown to the intended husband, and he raised no objection to it.

(a) Ambler, 301. (b) 7 De G. M. & G. 98. (c) 2 S. & S. 119.

Though, therefore, there is enough to bind him in the view of this Court to execute a settlement and to induce the Court to order him to do so, yet it would not be necessary to execute the settlement.

1863.
*Re HOARE'S
TRUSTS.
TRUSTEE
RELIEF ACTS.
Judgment.*

The costs of the trustee will come out of the funds, but no other order as to costs.

Ordered,—That the chief clerk's certificate finding that there was no ante-nuptial settlement be varied and read as if the said certificate did not contain that finding; and on the motion of the petitioners to vary the certificate no order; and on the petition on further consideration this Court doth order that a covenant be endorsed on the settlement as follows:—The within-named Hercules Walker, for himself, his heirs, executors, and assigns, doth hereby covenant, promise, and agree with the said W. Walker (the trustees) that if the said J. D. Walker was at any time of her marriage, or the said H. Walker in her right shall have become seized, possessed of, or entitled to any real or personal property of the value of 200*l.* or upwards, or for any estate or interest whatever, except jewels, trinkets, ornaments, plate, pictures, books, prints, and other articles of a like nature, which it is hereby declared shall belong to the said J. D. Walker for her separate use, then and in every such case the said H. Walker and J. D. his wife, and all other necessary parties, if any, shall at the cost of within mentioned trust funds, as soon as circumstances will permit, and to the satisfaction of trustees or trustee, convey, assign, and assure the said real or personal property, or cause the same to be vested in the trustees or trustee of within-mentioned trust funds upon the trusts within declared of the matters within assigned. And it is ordered the covenant so to be endorsed be executed by the said Hercules Walker. Tax and pay costs of respondent out of fund. No order as to costs of petitioner or Sir J. H. Lethbridge; and transfer residue of fund to trustees on trusts of indenture of settlement.—Reg. Lib. A, 2464, 9 Dec., 1862.

1863.

Jan. 16.

Where a solicitor was employed by the next friend in establishing an infant's title to certain land, the infant having attained twenty-one, the Court, under the 23 & 24 Vic. c. 127, s. 28, declared on petition so much of the costs as remained unpaid a charge on the land recovered.

BONSER v. BRADSHAW.

THE bill in this case was instituted by the next friend of an infant, the grandson and heir-at-law of one John Bonser, who, in 1854 and at the time of his death, was entitled to the equity of redemption in certain real estate consisting of houses and land in the county of Leicester, against the devisees of the same property under the will of John Bonser, dated the 7th August, 1850, and which had been proved in the Archdeaconry Court at Leicester.

The bill impeached the will, and prayed that it might be set aside; that the devisees thereunder might be directed to convey the real estate to the plaintiff; or, if necessary, that an issue of *devisavit vel non* might be directed.

In March, 1858, the plaintiff moved for an injunction and receiver, and also for an issue. His Honour refused the motion for the injunction, but made an order for an issue *devisavit vel non*. The issue was subsequently tried at Leicester, and, the jury having found a verdict for the plaintiff, the application for a receiver and for an injunction was renewed and the order made. Some portions of the estate were subsequently sold to a railway company, on which occasion the Court declared that John Bonser's heir-at-law was entitled to the property, and that the devisees were trustees for him. The Court also ordered that the defendant, who had set up the alleged will, should pay all the costs of the proceedings.

The purchase-money for the land which had been sold to the company, amounting to 266*l.*, was paid into court.

The taxed costs incurred in prosecuting the infant plaintiff's rights in the suit and action amounted to the sum of 492*l.*, a large part of which was the money paid

out of pocket by the solicitor employed by the next friend. The defendant, having become insolvent, a petition was, in December, 1860, presented on behalf of the infant plaintiff and his next friend praying for the payment out of court of the sum of 266*l.*, and for payment, so far as that sum would extend, of the costs due to the plaintiff's solicitor. The petition also prayed that the residue of the costs of the solicitor might be raised and paid out of the real estate recovered, or that the same might be declared to be a charge on the real estate under the 28th section of the Attorneys, Solicitors, &c., Act of 1860 (23 & 24 Vict. c. 127).

1863.
BROWN
v.
BRADSHAW.
Statement.

On the 21st December, 1860, the Court ordered payment to the solicitor of the fund in court in part payment of his costs, but refused to declare that the solicitor was entitled to a charge on the estate for the residue of his costs, on the ground that the Act of 1860 had no application to the case of an infant, but that it applied only to cases where the parties were *sui juris*. The infant plaintiff having attained the age of twenty-one, a petition was presented on behalf of the solicitor praying that the residue of the costs, charges, and expenses incurred by him in recovering the estate might be declared to be a charge on the estate, and might be raised and paid out of it.

Mr. Mahns and Mr. R. W. E. Forster appeared on the petition.

The VICE-CHANCELLOR made an order directing the costs, charges, and expenses to be taxed, and declaring that the amount certified by the taxing master should be a charge on the estate, to be raised by a sale of the same.

Judgment.

1863.

Jan. 30, 31.

Feb. 10.

The owner of a factory, being desirous of rebuilding his premises, submitted the plans, &c., to a committee, to whom the Town Council, also the Local Board of Health, delegated their powers, and, the plans having been approved, pulled down the factory, and proceeded to rebuild it according to such plans. The Town Council, under the 35th section of the Local Government Act, 1858, relating to buildings to be erected, having required the plaintiff to set back his premises, the Court restrained them by injunction from interfering with the erection of the factory according to the approved plans.

SLEE v. THE CORPORATION OF BRADFORD.

THE plaintiffs for several years prior to the filing of the bill had been entitled to a piece of land in Bradford, abutting on a street called Chapel Lane, on which he had a manufactory and warehouses, subject to an agreement for a lease. For two years and upwards the plaintiffs carried on the business of leather merchants, tanners, and millboard makers in partnership, and occupied and used the said warehouse and premises for the purposes of their business, until they were pulled down under the circumstances detailed in this case. Under their partnership agreement it was one of the terms that the manufacturing warehouses and premises should be held by the plaintiff's partnership as lessees under the plaintiff Henry Slee for a term of twenty-one years from the 24th March, 1861, at a rent of 160*l.* per annum, subject to the usual covenants.

In the year 1850 a local Act, 13 & 14 Vic. c. lxxix., was passed for the better regulation and management of the borough of Bradford. It incorporated portions of the Public Health Act, 1848 (11 & 12 Vic. c. 63), and several provisions of the Towns Improvement Clauses Act, 1847 (10 & 11 Vic. c. 34), and enacted, sec. 16th, that the town council should be the local board of health, and, sec. 22, that copies of bye-laws should be evidence.

Sec. 11 was as follows:—

And be it enacted that the council may appoint out of their own body, from time to time, such and so many committees, and consisting of such number of persons as they shall think fit, for all or any of the purposes of this Act, which, in the discretion of such council, would be better regulated and managed by means of such commit-

tees, and may fix the quorum of such committees: Provided always that the acts of every such committee shall, in case the council so order, but not otherwise, be submitted to the council for their approval; but that no expenditure or payment, or contract to expend or pay any sum of money, made by such committee shall be lawful or valid, when such sum shall exceed the sum of 100*l.*, unless such committee shall have been authorised by the council to make such expenditure, payment, or contract, or unless, if not so authorised, such expenditure, payment, or contract shall, after the same has been made, be approved of by the council. Sec. 13. And be it enacted that every committee so appointed may meet from time to time, and may adjourn from place to place as they think proper, for carrying into effect the purposes of their appointment; but no business shall be transacted at any meeting of the committee, unless the quorum of members (if any) fixed by the council, and if no quorum be fixed three members, be present; and at all meetings of the committee one of the members present shall be chosen chairman, and all questions shall be determined by a majority of the votes of the members present, and in case of an equal division of votes the chairman shall have a casting vote in addition to his vote as a member of the committee. Sec. 14: And be it enacted that the treasurer and town clerk for the time being of the said borough shall be the treasurer and clerk for the purposes of this Act.

By sec. 59 it was *inter alia* enacted that the word "house or houses" shall include any messuage or dwelling-house, tenement, warehouse, factory, mill, dye-house, manufactory, building, or other enclosure, and every part thereof, &c. &c.

The town council in pursuance of their powers under the Local Government Act made bye-laws, which were on the 20th October, 1860, confirmed by the Secretary of State for the Home Department.

1863.
SLER
 v.
 THE COR-
 PORATION OF
 BRADFORD.
 —
Statement.

1862.

SHEE

v.

THE CORPORATION OF
BRADFORD.*Statement.*

The 20th bye-law was as follows:—

Every person who shall intend to erect any new building shall give a fortnight's notice to the council of such intention by writing, delivered to the surveyor, or left at his office, and shall at the same time leave or cause to be left at the said office plans and sections of every floor of such intended new building, drawn to a scale of one inch to every eight feet, showing the position, form, and dimensions of the several parts of such building, and of the 'water-closet, privy, cesspool, ashpit, well, and all other appurtenances, and such plans and sections shall be accompanied by a description of the intended mode of drainage and means of ventilation of drains, and the materials of which the drains are to made, also of the construction and dimensions of the chimneys and flues, and means of water supply. A plan shall be left at the same time showing the position of the buildings and appurtenances of the properties immediately adjoining, the width and level of the street, the level of the lowest floor of the intended building, and of the yard or ground belonging thereto. The plan shall show also the proposed lines of house drainage, and their size, depth, and inclination.

On the 18th March, 1862, the council made certain bye-laws numbered respectively 6, 22, 24, in lieu of others numbered similarly, and such altered bye-laws were confirmed on the 14th April, 1862, and the said bye-law numbered 24 was as follows:—

The council shall by their order approve or disapprove proposed new works or buildings within the time severally specified herein for the deposit of notices thereof. If the owner or person intending to construct any new street or erect any new building fail to give the notices herein required, or proceed to the execution of any of the works before the expiration of such notices, without such approval of the council as aforesaid, or if, contrary

to the provisions herein contained, any owner or person shall construct or cause to be constructed any works, or do any act, or omit to do any act or comply with any requirement of the council or their surveyor acting under the authority of the foregoing bye-laws, or make any alteration in any works after they have been completed, whether in new or or existing buildings, he shall be liable for each offence to a penalty not exceeding 5*l.*, and he shall pay a further sum not exceeding 40*s.* for each and every day which such works shall continue or remain contrary to the said provisions, and the council may, if they shall think fit, cause such works to be removed, altered, pulled down, or otherwise dealt with as the case may require, and the expense incurred by them in so doing shall be repaid by the offender, and be recoverable from him in a summary manner as provided by the Public Health Act, 1848.

1863.
SLEER
v.
THE CORPORATION OF
BRADFORD.
Statement.

The bill alleged (par. 6) that "shortly before the month of May, 1862, the plaintiffs, being desirous of effecting extensive improvements in their said manufactory and premises, determined to pull down and rebuild on the same site their said buildings, in [case such rebuilding should be permitted by the defendants' council, and for the purpose of ascertaining whether such rebuilding would be so permitted, and also in compliance with the 20th bye-law, which was and still is in force, they caused to be prepared by Messrs. Andrew [& Delaunay, architects, certain plans, sections, and particulars of the said proposed new buildings, such as were required by the said 20th bye-law ; and they caused such notice in writing to the defendant's council of their said intention to erect such new buildings as was required by the said 20th bye-law to be delivered to the surveyor of the said council, or left at his office, as required by the said bye-law," together with the said plans ; "and they, the said plaintiffs, in all respects complied with the said bye-law."

1863.
 SLEE
 v.
 THE CORPORATION OF
 BRADFORD.
 —
Statement.

Paragraph 7 of the bill charged that the plaintiffs' notice, plans, sections, and particulars were laid before the Building and Improvement Committee of the said council (which committee had been duly appointed pursuant to the said 11th section of the Bradford Improvement Act, 1850, and had cognizance of the matter), and the said committee by their resolution 'duly and finally approved of the same; and the plaintiffs charge that such approval and the resolution whereby the same was given were duly entered on and appear by the minutes of the said council and of the committee, but the plaintiffs are ignorant of the precise date and terms of the said resolution. The plaintiffs charge that such approval was the approval of the defendants' council in pursuance of the said 24th altered bye-law, and was a due exercise of the jurisdiction vested in that behalf in the defendants by the said acts and bye-laws, and became, and was, and is irrevocably binding on the defendants.

By order of the committee the surveyor of the town council sent to the plaintiff's architect the following letter:—

" Borough Surveyor's Office,
 " Bradford, May 14, 1862.

" Sir,—I beg to inform you that your plans, sections, and particulars of a currier's warehouse and offices proposed to be erected in Chapel Lane for Mr. Henry Slee, have been laid before the Building and Improvement Committee of the council, and that said committee has approved of the same.

" I am, Sir,

" Your obedient servant

" ROBERT LYNAM,

" For Borough Surveyor.

" To Messrs. Andrews & Delaunay, Architects.

" *Note.*—The ratification of the approval of any plans

and particulars by the Building and Improvement Committee refers only to such matters and such parts of the said plans and particulars as are required to be set forth, shown, or described thereon, in accordance with the bye-laws especially made for the regulation of the laying out and forming of new streets, and the erection of new buildings. And it must be distinctly understood that such approval does not include or give the consent of the committee or council to any other part of the plans or sections deposited, nor for the doing of any work whatsoever other than that set forth, described, and required by the above-mentioned bye-laws. It will, therefore, be understood that the approval of the committee gives no authority whatsoever for the making of any projection on the front of any building into any street beyond the proper line of such street, nor for the taking up of any causeway or roadway for the purposes of the erection of such building, nor for the making of any excavations in any street or road, nor for the making of any communication or connection with any public or private pipe, drain, or sewer, nor of the mode or manner in which any other connection with any public or private sewer shall be made, nor for the placing of any building material on any part of any street or road, nor (with reference to plans of buildings) of any lines or widths, of causeways or streets, nor of the height of any new chimney proposed to be built in connection with any mill, manufactory, or business premises whatsoever, although any or all of such matters may be fully set forth, shown, or described in the plans, sections, and notices deposited with and approved by the committee; but in every case in which such work and alteration, interference, &c., is required to be done, separate and specific notice thereof must be given to the borough surveyor, and the consent and permission of the committee or council obtained for every such work as the case may require."

1863.
 SLEE
 v.
 THE CORPORATION OF
 BRADFORD.
 —
 Statement.

1863.
SLEE
v.
THE COR-
PORATION OF
BRADFORD.
—
Statement.

The 8th paragraph of the bill alleged that the plaintiffs, upon receiving the said notice of the approval by the said council of the said plans, sections, and particulars, relying thereon, and in the full confidence that the defendants would abide by and were bound by the same, began to pull down their said buildings, which, up to that time, had not been disturbed, and pulled down the same in ignorance that the defendants had any intention of interfering with the rebuilding thereof according to such plans, sections, and particulars, and without receiving any intimation from the defendants or their council or committee, or any one on their behalf of any such intention.

The bill alleged that on the 24th June, and so soon as the plaintiffs' buildings had been pulled down, the town council passed some resolution of which the plaintiff had no copy, but which was to the same effect as the following resolution passed next day :—

“ Resolved that, the building or buildings situate in and fronting to a street called Chapel Lane, in the borough of Bradford, recently occupied by Mr. Henry Slee as a tanning warehouse or otherwise, and the appurtenances thereto, having been taken down in order to be rebuilt or altered, it be and is hereby ordered and prescribed that any house or building to be hereafter built on the site thereof, or of some part thereof, shall be erected on the line shown in the plan hereto annexed, the said prescribed line being marked on the said plan which is now produced and signed by the chairman, and thereon coloured red, and called thereon ‘Line of front of buildings when rebuilt or altered,’ and which line shall be the line of the outer or front wall towards Chapel Lane aforesaid of any house or building to be erected as aforesaid, That the notice to Mr. Henry Slee now read be approved, and that the corporate common seal be affixed thereto.”

On the same occasion the chairman of the committee signed the plan, which was to the same effect as the notice of the 27th June, 1862, which, with a copy of the resolution signed by Mr. Light then deputy mayor, whereby the plaintiffs were required to comply with the requisition of the said resolution as to the line of buildings, and further giving notice that the town council, under the powers of the Lands Clauses Consolidation Act, 1845, require to purchase a part of the plaintiffs' premises specified in a schedule for the purpose of improving Chapel Lane, and requiring the plaintiffs to state the particulars of their estate and interest therein. By the plan annexed to the notice the plaintiffs were required to set back the front of their proposed building along the whole of the frontage at a distance of twelve feet three inches at the nearest and fifteen feet two inches at the furthest from the frontage, so as to cut off an area of $592\frac{1}{2}$ square yards of the plaintiffs' land, which they had intended to cover with their new buildings as shown by the plans. The plaintiffs charged that the required alteration in the line of frontage, if permitted to be insisted on, would be wholly destructive of their plans for building, and would render the residue of their piece of land insufficient, unsuitable, and useless for the buildings for the purposes of their trade.

On the 2nd July the town clerk sent to the plaintiffs' solicitors the following letter:—

“ Town Clerk's Office, Bradford, Yorkshire,

“ 2nd July, 1862.

“ Dear Sirs,

“ Improvement of Chapel Lane.

“ I beg to hand you copy of a resolution of the General Improvement Committee passed on the 1st instant. I also beg to give you notice that Mr. Slee may

1863.

SLEE

v.
THE CORPORATION OF
BRADFORD.

Statement.

1862.
 SLEE
 v.
 THE COR-
 PORATION OF
 BRADFORD.

—
Statement.

proceed at once to build to the line of frontage prescribed in the notice dated the 27th ultimo, and to make an vault, arch, or cellar under the proposed causeway not extending more than six feet beyond the prescribed line of frontage. In case you should recommend Mr. Slee to submit a fresh plan to avoid the possibility of any question as to his incurring penalties by building without an approved plan, I will convene a special meeting to consider it, in order to avoid delay and to facilitate your client's proceeding with the erection of his buildings.

"I am, dear Sir,

"Yours truly,

"JOSEPH RAYNER,

"Town Clerk.

"Messieurs Lees & Senior,

"Solicitors, Bradford."

The plaintiffs charge that by the said letter the defendants admitted, as the fact is, that by their said proceedings they were and are attempting to revoke and annul their aforesaid approval of the plaintiffs' said plans, which the plaintiffs charge they had and have no power to do.

The resolution of the 1st day of July, 1862, of which a copy was enclosed in the said last-mentioned letter was as follows:—

"Resolved—That the suggestion of the committee to the Building and Improvement Committee with reference to the prescribed line of front of buildings to be erected by Mr. Henry Slee, having been adopted by such committee, this committee hereby adopts such line as the permanent line of frontage on the south side of Chapel Lane, and that the causeway on the south side of Chapel Lane as the same shall be from time to time improved shall not be less than six feet."

The plaintiffs, believing that they were entitled to require the defendants to take the whole of their premises, caused a notice to be served on them to that effect, whereby they required 1000*l.* for the leasehold interest, 6074*l.* 19*s.* for compensation for loss of trade, injury or damage by removal, 916*l.* 10*s.* for loss in collection of book debts, 1002*l.* 8*s.* for loss as to stock of leather, &c., 550*l.* for loss of fixtures, plant, &c. Henry Slee (the lessor) also claimed 5280*l.* for his interest therein. On the 21st July, 1862, the plaintiffs also gave notice that they required to have their claims settled by arbitration. They also by their solicitor expressed their willingness to allow an inspection of their books.

1863.
 SLEE
 v.
 THE CORPORATION OF
 BRADFORD.
 —
Statement.

A correspondence between the plaintiffs' solicitors and the town clerk ensued, and on the 8th August, 1862, Mr. Rayner sent the following letter to the plaintiffs' solicitors, and on the same day withdrew their notice to take the property under the Lands Clauses Consolidation Act:—

“ Town Clerk's Office, Bradford,
 “ 8th August, 1862.

“ Dear Sirs,

“ The Corporation and Slee.

“ I have submitted your letter of the 5th instant to a special meeting of the Building and Improvement Committee held this afternoon. The committee directed a fresh notice to your client, which has been served on Messrs. Lees & Senior in accordance with your direction as to future notices. The charges of injustice contained in your letter must have been made either in ignorance of the facts or without having considered the relative position of the corporation and parties proposing to build. I think it clear beyond doubt that, as between the council, or their Building and Improvement Committee, and the burgesses, the former are not justified, for obvious reasons, in inti-

1868.

SLEE

v.

THE CORPORATION OF
BRADFORD.*Statement.*

mating to parties intending to build that the powers of the 35th section will be put in force when the old buildings are taken down; but a practice prevailed when I was appointed to this office, which still exists, of giving express notice, in approving of plans of proposed new buildings, that the same must not be considered an approval of the line or width of streets. I understand this notice was given by the borough surveyor to your clients' architects, but independently of this I hope you will see fit, after the explanation I have given, to withdraw the charge of injustice contained in your letter. If any reference to arbitration should take place, I shall be glad, when the proper time arrives, to communicate with you as to whether it should be held in London, and also as to the propriety or necessity for employing counsel upon it. At present I consider it altogether premature to go into such matters.

"The Corporation and Slee & Son.—I shall have occasion to give a notice to Messrs. Slee & Son, which I will serve upon Messrs. Lees & Senior to-morrow.

"I am, dear Sirs,

"Yours faithfully,

"JOSEPH RAYNER,

"Town Clerk."

Upon receiving the notices of the 8th and 9th August, 1862, the plaintiff's solicitor retracted the claim for compensation, and gave notice that they would serve the corporation with formal notice to appoint an arbitrator. In reply Mr. Rayner denied that the corporation were bound to take the property. After some negotiation the plaintiff's solicitor served the notice to appoint an arbitrator, and appointed Mr. Clifton to act on their behalf. In answer to this the defendants served a counter-notice offering compensation, and declining to take the premises. Some further correspondence ensued, but on the 5th

January, 1863, the defendants served the following notices on the plaintiffs:—

“ To Mr. Henry Slee.

1863.
SLEE
v.
THE COR-
PORATION OF
BRADFORD.
—
Statement.

“ This is to give you notice that the mayor, aldermen, &c., acting as the local board of health in and for the district of the said borough, in pursuance of the power given to them by the Bradford Improvement Act, 1850, and the Acts therewith incorporated, the Local Government Act, 1858, and the Lands Clauses Consolidation Act, 1845, intend, immediately after the expiration of ten days from the giving to you of this notice, to cause a jury to be summoned for the purpose of their assessing and determining the sum of money to be paid by the said corporation for the damages sustained or to be sustained by you in consequence of the building in Chapel Lane within the said borough, and belonging to you, being set back in accordance with the notices of the said corporation dated the 27th day of June and the 8th day of August, served upon you on the 28th day of June and the 8th day of August last. And this is to give you further notice that the said corporation are willing to pay and hereby tender to you the sum of 350*l.* sterling for the loss or damage sustained or to be sustained by you in consequence of the said house or building being set back in manner aforesaid.

“ M. W. THOMPSON, Mayor.” (L.S.)

And—

“ To Messrs. Slee.

“ Take notice that under and by virtue of and in exercise and execution of the powers and provisions of the Public Health Act, 1848, the Bradford Improvement Act, 1850, and the Acts therewith incorporated,

1863.
 SLEE
 v.
 THE COR-
 PORATION OF
 BRADFORD.

Statement.

the Local Government Act, 1858, and the Lands Clauses Consolidation Act, 1845, the mayor, &c., of the borough of Bradford, acting as the local board of health in and for the borough, having required the house or building referred to in the notice dated and served upon you on the 9th day of August last to be erected in the line prescribed by the resolution and notices to you the said Henry Slee referred to in the said notice (a copy of which, with the plan, is hereunto annexed), and the said corporation are ready to treat for and pay compensation for the damage sustained or to be sustained by the owners or other persons immediately interested therein in consequence of the said house or building being set back to such prescribed line. And take further notice that the said corporation demand from you the particulars of your claim for compensation in respect of any loss or damage sustained or to be sustained by you in consequence of the said house or building being set back as aforesaid, and such particulars may be delivered or sent in writing to the town clerk of Bradford at his office. And take further notice that if for twenty-one days after the service of this notice on you you shall fail to state the particulars of your claim in respect of the premises, or to treat with the said corporation in respect thereof, or if you and the said corporation shall not agree as to the amount of compensation to be paid by them for any loss or damage sustained or to be sustained by you in consequence of the said house or building being set back, the amount of such compensation will be settled under the provisions of the Lands Clauses Consolidation Act, 1845; and the said corporation will take such further proceedings as under the circumstances they are by the said Acts or any of them empowered to take.

“Dated this 5th day of January, 1863.

“M. W. THOMPSON, Mayor.” (L.S.)

The plaintiffs charged that the defendants intended to act on the said notices; and that they were vague, and did not determine on which of the notices the jury was to assess compensation, or whether on the footing that, exclusive of any purchase by the defendants of the same, plaintiffs were to retain the ownership of the property subject to a restriction against building on the same; and that the defendants intended to endeavour to give compensation on the assumption that the ownership was to be in the plaintiffs, and to act on the footing that they were to be deprived of all interest therein. The plaintiffs further charged that the plaintiffs had been put to great charge and loss, and further charged that, in case they proceeded to erect their buildings otherwise than in accordance with the new plans to be hereafter left at defendants' offices, and to be approved by the committee, the defendants threatened and intended to pull down the buildings so erected, and to proceed against the plaintiffs for fines and penalties for a large amount, increasing from day to day, under the statutes. The plaintiffs charged they could not safely proceed with the buildings, or permit the defendants to proceed for the purpose of assessing compensation under the Lands Clauses Consolidation Act, 1845.

The bill prayed as follows:—

That the defendants might be restrained from issuing or proceeding upon any warrant to summon a jury, and from taking any other proceeding under these notices, or otherwise in respect of the premises, except proceedings for purchasing, and taking, and assessing compensation by arbitration of the whole of the plaintiffs' premises, and from interfering with the rebuilding by the plaintiffs of their manufactory according to the plans so approved by the defendants, and from recovering or enforcing any fine or penalty against the plaintiffs in respect of such rebuilding, and from in any way enforcing any resolution or order requiring the plaintiffs' buildings to be erected

1863.
 SLEE
 v.
 THE CORPORATION OF
 BRADFORD.
 —
Statement.

1863.
 SLEE
 v.
 THE COR-
 PORATION OF
 BRADFORD.

Statement.

on the prescribed building line, or requiring the same to be erected otherwise than in conformity with the said plans, sections, and particulars so approved by the defendants, and also (if necessary) from permitting any such resolution or order to remain unrescinded.

That otherwise and in case of the said defendants being permitted to carry on their said proceedings without purchasing the said plot of ground in front of the said building line, they, their surveyors, agents, and workmen might be restrained from constructing the causeway or carriageway of Chapel Lane aforesaid over the same, and from throwing the same into Chapel Lane aforesaid for public use as part thereof, and from in any way depriving or attempting to deprive the plaintiffs of the exclusive use and ownership thereof.

That the defendants might be decreed to make compensation to the plaintiffs for all losses, damages, and expenses occasioned or to be occasioned to the plaintiffs by the aforesaid interruption of the rebuilding of the plaintiffs' said intended new buildings according to the said approved plans, sections, and particulars, or otherwise by the defendants' aforesaid proceedings.

Argument.

Mr. *Malins* and Mr. *Bagshawe* for the plaintiffs.

The town council and the committee were one tribunal, and if so the case stood thus—that, having no power to interfere with the plaintiffs' buildings so long as they were standing, they induced him, by a promise to allow him to rebuild them in the way he proposed, to pull them down, so as to give them jurisdiction under the 35th section of the Local Government Act, 1858, and then turned round and repudiated the arrangement which they had entered into as to the rebuilding. It was submitted that this was a breach of faith such as this Court would not permit, and that the plaintiff was entitled to an injunction to restrain the defendants from acting on these

notices, and from preventing the plaintiff from rebuilding his premises according to the approved plans.

Sir *Hugh Cairns* and Mr. *Freeling* for the defendants.

The question really was whether in point of fact the town council delegated their powers to the committee, and it was submitted they did not. Mr. Lynam's letter of the 14th May, 1862, only approved of the plans of the buildings; but in the note appended to such letter it was expressly stated "that the approval of the committee gave no authority whatsoever for the making of any projection on the part of any building into any street beyond the proper line of such street." Moreover the bye-laws under which the corporation acted were made, not under the 34th section of the Act of 1858, which contains no powers for the particular purpose contemplated by their bye-laws (Chapel Lane not being a "new" street), but under the 35th section, which plainly authorises the council to set a new building back. Moreover, there was nothing here which the Court could restrain, unless it were an award of damages under the 34th section. The corporation could not interfere with the plaintiffs' building.

It was submitted, therefore, that the plaintiff was not entitled to the injunction, and the motion must be refused.

Mr. *Malins* was heard in reply. (a) ;

The VICE-CHANCELLOR :—

The plaintiffs are the owners and proprietors of a manufactory in the town of Bradford, in which they

1863.

SLEE

v.

THE CORPORATION OF
BRADFORD.

Argument.

Judgment.

(a) The sections of the different Acts referred to were as follows :—

Section 68, Towns Improve-

ment Clauses Act, 10 & 11 Vic. c. 34 (1847). "When any house or building any part of which projects beyond the regular line of

1863.

SLER

v.

THE COR-
PORATION OF
BRADFORD.*Judgment.*

carry on the business of leather merchants in partnership. They determined to pull down and re-erect the greater

the street, or beyond the front of the house or building on either side thereof, has been taken down in order to be rebuilt or altered, the commissioners may require the same to be set backwards to or toward the line of the street, or the line of the adjoining houses or buildings, in such manner as the commissioners direct, for the improvement of such street, provided always that the commissioners shall make full compensation to the owner of any such house or building for any damage he thereby sustains."

Section 34, Local Government Act, 21 & 22 Vic. c. 98. "Every local board may make bye-laws with respect to the following matters, that is to say, first, with respect to the level, width, and construction of new streets, and the provisions for the sewerage thereof. Secondly, with respect to the structure of walls of new buildings for securing stability and the prevention of fires. Thirdly, with respect to the sufficiency of the space about buildings to secure a free circulation of air, and with respect to the ventilation of buildings. Fourthly, with respect to the drainage of buildings; to waterclosets, privies, ash-pits, and cesspools in connection with buildings; and to the closing of buildings or parts of buildings unfit for human habitation; and to prohibition of their use for such habitation. And they may further provide for the observance of the same by enact-

ing therein such provisions as they think necessary as to the giving of notices, as to the deposit of plans and sections, by persons intending to lay out streets or to construct buildings; as to inspection by the local board, and as to the power of the local board to remove, alter, or pull down any work begun or done in contravention of such bye-laws, provided always that no such bye-law shall affect any building erected before the date of the constitution of the district. But for the purposes of this Act the re-erecting of any building pulled down to or below the ground floor, or of any frame building of which only the frame work shall be left down to the ground floor, or the conversion into a dwelling-house of any building not originally constructed for human habitation; or the conversion into more than one dwelling-house of a building originally constructed as one dwelling-house only, shall be considered the erection of a new building."

Section 35. "When any house or building has been taken down in order to be rebuilt or altered, the local board may prescribe the line in which any house or building to be hereafter built shall be erected, and the same shall be erected in accordance therewith, and the local board shall pay or tender compensation to the owner or other person immediately interested in such house or building for any loss or damage

part of this manufactory upon an improved plan, but before pulling it down, being aware that they must obtain the approval of the plan by the Corporation of Bradford and the town council under the powers of their Act of Parliament, they gave formal notices in compliance with the Acts of Parliament and the bye-laws of the council. The first question is whether with reference to the pulling down and re-erecting buildings of this kind the bye-laws have any application.

1803.
—
SLEE
v.
THE CORPORATION OF
BRADFORD.
—
Judgment.

It has been contended on behalf of the town council that upon the true construction of the Act of Parliament they have no power to delegate to any committee their authority to approve the plans of rebuilding with reference to lines of the streets, and that they have no power to make bye-laws upon that subject, but that the power as to bye-laws is reserved to themselves. But it appears that the plaintiffs served their notice and delivered the plans submitted for approval, not to any committee, but to the council, according to the form prescribed by the Act. The plans so deposited indicated the position in which the front of the new building was to be rebuilt with reference to the adjoining property. The bye-law required that the plans and sections should not only show the position of different parts of the building, with reference to other parts, but should also clearly indicate the position of the new building with reference to adjoining property, and to the line of the street. The first question is whether that bye-law was authorised by the Act of Parliament, but I must observe that if this interlocutory

he may sustain in consequence of his house or building being set back; the amount of such compensation in case of dispute to be settled in the same manner as compensation for land to be taken under the provisions of the Lands Clauses Consolidation Act,

1845, is directed to be settled. And all the provisions of the said last-mentioned Act relating to the purchase of lands shall apply to the payment made for such loss or damage as if it were a purchase under such Act."

1863.
SLEE
v.
THE COR-
PORATION OF
BRADFORD.
—
Judgment.

application is refused the plaintiffs will be placed in a most unfair and inconvenient position, for they will be unable to proceed with their new building unless they submit to the dictation of the town council. The 68th section of the Act of 1847, which is incorporated in the Bradford Improvement Act, 1850, provides that where any house or building, any part of which projects beyond the regular line of a street, or beyond the front of the houses and buildings on either side, has been taken down in order to be rebuilt or altered, the commissioners may require the same to be set backward to or toward the line of the street, or the line of the adjoining houses. Such is the power given by the Act of 1847; and the Act of 1850, in the 11th section, seems to authorise the town council to make bye-laws with reference to that subject. The Public Health Act, 1846(a), is incorporated with the Act of 1858, upon the construction of which the case of the defendants has been mainly rested. The 34th and 35th sections of the Act of 1858 refer to the rebuilding in towns of houses which have been taken down. But it is said for the defendants that the 34th section, although it says that bye-laws may be made upon various subjects, does not authorise any bye-law to be made by the local board with reference to this question. That view cannot be maintained, because it is obvious that the object of the Corporation of Bradford here is to have the front of the building removed further back, in order that the street may be widened. The question, then, is simply as to the width of the street, because the width of the street must depend upon the position of the front of this house. The very first thing upon which the local board is authorised to make bye-laws by the 34th section is with respect to the level, width, and construction of new streets, and the provisions for the sewerage thereof, with respect to the structure of walls of new buildings and so on, and

(a) 11 & 12 Vict. c. 63.

then they may provide for the observance of this by requiring notice to be given as to the deposit of plans and sections by persons intending to lay out streets or to construct buildings.

The plan submitted by the plaintiffs for approval was a plan with reference to the construction of a building, but the latter part of the clause says that for the purpose of this Act the re-erecting of any building pulled down to or below the ground floor shall be considered the erection of a new building. That is this very case. This is not the erection of a new building; it is the erection of a building which, according to the words of this section, has been pulled down and is proposed to be rebuilt; and that is treated on the same footing with reference to bye-laws as the erection of new buildings. It is quite plain that the local board of Bradford put that construction upon it, for they made a bye-law under which the present plaintiffs had the very difficult task of endeavouring to proceed. The 20th bye-law is in these terms:—"Every person who shall intend to erect any new building shall give a fortnight's notice to the council of such intention by writing delivered to the surveyor or left at his office [that is, notice to the council, not to any committee], and shall at the same time leave or cause to be left at the said office plans and sections of every floor of such intended new building, showing the position, form, and dimensions of the several parts of such building," with other words which it is not necessary to refer to.

The first plan required to be deposited is one to show the dimensions of the various parts of the new building; then, besides that, this is required:—A plan shall be left at the same time showing the position of the buildings, and appurtenances of the properties immediately adjoining, the width and level of the streets, &c.

Notice was given to the council, and plans were deposited. It is stated in the bill that, shortly before the month of May (the particular date is not stated), the plaintiff

1863.
SLEE
v.
THE CORPORATION OF
BRADFORD.
—
Judgment.

1803.
BLEE
 v.
 THE COR-
 PORATION OF
 BRADFORD.
 —
Judgment.

caused a notice in writing to be sent to the defendants' council of their intention to erect such new buildings as required by the 20th bye-law, to be delivered to the surveyor of the said council, or left at his office. The plans and sections so left were several; they showed not only, as required by the bye-law, the dimensions and particular position of every part of the new building with reference to other parts of the new building, but, as mentioned in the bye-law, they showed the position of the front of the building with reference to the adjoining properties. On the 14th May the borough surveyor informed the plaintiffs that the plans, sections, and particulars had been laid before the building and improvement committee of the council, and that the committee had approved of the same. Whether the committee had or had not the power to approve is a question that must be dealt with; but, assuming for a moment that they had the power, it is said that this approval was only a qualified approval, so as to reserve in express terms to the council the power of altering the line of the new building with reference to the position of the street.

The surveyor's note says that the ratification of the approval of any plans and particulars by the building and improvement committee refers only to such matters and to such parts of the said plans and particulars as are required to be set forth, shown, or described therein in accordance with the bye-laws. But it appears that the bye-law required, as one of the particulars, a plan of the line with reference to the adjoining buildings. It is said that the following passage amounts to a qualification:—"It will, therefore, be understood that the approval of the committee gives no authority whatever for the making of any projection on the front of any building into any street beyond the proper line or for placing any building material on any part of any street or road;" and here are the words—"with reference to plans of buildings of an

lines or widths of causeways or streets, or of the height of any new chimney proposed to be built in connection with any mill, manufactory, or business premises whatsoever, although any or all of such matters may be fully set forth, shown, or described in the plans, sections, and notices deposited with and approved by the committee."

So far the language would seem to favour the construction of the defendants, but these words follow:—"But in every case in which such work, alteration, interference, &c. (that is width of the street or the line of the building), is required to be done, separate and specific notice thereof must be given to the borough surveyor, and the consent or permission of the committee or council obtained for every such work." But specific notice, as specific as a plan could give, was given on the first of the plans deposited, which shows exactly the line in which the front of the building was proposed to be erected by the plaintiffs; and, therefore, this qualification of the approval in no degree interfered with that argument upon which the plaintiffs insist, namely, that their plan gave notice of of and showed everything that was required to be submitted with reference to the line of the new building for the approbation of the committee or of the council. This reduces the question to this point—whether the council have, under the 35th section of the Act of Parliament, a power reserved to them to contravene the approval of the committee; for that the approval of the committee was given to this line of building under as specific a notice as their bye-law, and their intimation of the qualification which is annexed to their approval, required, is beyond question.

The 35th section of the Act of 1858 is in these terms:—"When any house or building has been taken down in order to be rebuilt or altered, the local board may prescribe the line in which any house or building to be hereafter built shall be erected, at the same time making compensation."

1863.
SLEW
v.
THE CORPORATION OF
BRADFORD.
—
Judgment.

1808.
 SLEB
 v.
 THE COR-
 PORATION OF
 BRADFORD.
 —
Judgment.

The difficulty is in reconciling the absolute and clear language of this clause with what is previously stated in the 34th clause; but, taking the two together, it seems to me that the 34th section authorised the local board to make bye-laws upon the subject, and that the 35th section can only be considered to apply to the case in which a building has been taken down without previous approval of the plan. I can find no other way of reconciling the two provisions of the Act, because the construction contended for by the defendants would go this length, that, although a man's plans and sections of his building may have been approved of, it is not until he has actually taken down his building, whether the plan has been approved of or not, that the question of how it is to be re-erected with reference to the line of the street, is to be considered and determined.

It is plain that, if the object of the Act of Parliament was the improvement of the line of street, it could never have been the intention that, although before the building was taken down plans and sections with reference to the line of the building in connection with the line of the adjoining buildings and streets had been approved of, and the owner of the building took it down upon the faith of its being erected in the old line, yet, after the building had been taken down, a new power should arise on the part of the town council to say, "Although the owner pulled down the building expecting to build it up in the old line, we will prohibit it from being so built." That is not a reasonable construction, and could only be adopted by this Court upon clear and unqualified language of the Legislature. The language of the 34th section, taken in connection with the 35th, shows that there is nothing in the 35th section (which is silent about plans) to interfere with what has been done with reference to the approbation of plans of new buildings to be erected in reference to the line of the street.

1868.
 SINE
 V.
 THE COR-
 PORATION OF
 BRADFORD.
 Judgment.

It is impossible not to feel that there is very great difficulty in arriving at the true construction of these Acts of Parliament, and this is distinctly shown by the fact that when the town council resolved to interfere with the plaintiffs, they misunderstood the Act of Parliament, and believed they had under the Lands Clauses Act a power to purchase all that piece of ground that would be left between the old line of the street and the new line of the front. The question, then, is whether, where the owners of a manufactory have delivered plans for the approval of a town council, and the council by their committee signify the approval of their plans, and when, on the faith of that approval, the building is taken down, it is competent to the defendants to alter the plans as to the front of the building. In my opinion the council had power to make bye-laws. The plaintiffs gave such notice under these bye-laws as was necessary, not only as to the plans of the particular parts of the building, but as to the position of the front of the building with reference to the line of street. Under such circumstances the approval given by the surveyor, not of the committee, but of the council, that is to say, of the local board, is one upon the faith of which the plaintiffs were justified in the course they took, and, if so, the defendants have no right now to interfere with the plaintiffs in re-erecting their building according to the plan which was approved with reference to the line of the street.

It has been argued that, although the defendants have insisted upon the line of the new building being set back, they do not threaten to pull it down again if the plaintiffs should proceed to build it; that they do not threaten to exact a penalty; and the whole line of their argument, and all that they have been struggling for in this Court, is their right to insist upon the plaintiffs setting it back. The injunction which the plaintiffs seek is to restrain the defendants from interfering in any way or exacting any

1863.

SLNE

v.

THE COR-
PORATION OF
BRADFORD.*Judgment.*

penalty. In the present stage of the litigation the plaintiffs are entitled to the injunction of the Court to prevent that apprehended interference. The position of the present plaintiffs seems to me eminently to require the benign consideration of the Court. In good faith, with an honesty which cannot be impugned, they pulled down their building, relying upon the approval of the committee, and trusting without doubt that when they had pulled it down they might rebuild it in the same line with reference to the street as indicated in the plan which had been approved by the surveyor of the town council. If I were, by refusing an injunction now, to leave the question in the state in which it would be but for the interference of the Court, the position of the present plaintiffs would be one of great difficulty. Their manufactory would remain pulled down, although its immediate re-erection is obviously required for the purpose of continuing the works and setting the business going which they have been for years engaged in conducting. Upon the whole, with a full sense of all the difficulties of the question, I must grant an injunction until the hearing of the cause to restrain the defendants in the terms of the notice of motion.

ADAMS v. SWORDER.

1863.

March 13th.

THIS bill was filed by the plaintiff against Thomas Sworder and William G. Ree, praying that the sale to the defendants by the plaintiff's assignees in bankruptcy of the life interest of the plaintiff in a freehold estate called the Cannons Estate, and of a policy of assurance on the plaintiff's life, might be set aside as fraudulent and void.

The plaintiff, prior to his bankruptcy, carried on business as a banker and a maltster at Hertford and Ware, and was adjudicated bankrupt in July, 1856. Two of his creditors were appointed assignees of his estate, the official assignee being Mr. Whitmore, and afterwards Mr. Cannan.

The defendant Thomas Sworder was a member of the firm of Longmore, Sworder, & Longmore, solicitors at Hertford, who, together with Messrs. Lawrance, Plews, & Boyer, were employed by the assignees as joint solicitors to the estate in the bankruptcy.

The bill alleged that the defendant Sworder, having acted as solicitors to the assignees, had acquired a knowledge of the value of the estate. The bill also alleged that the defendant Ree, a partner in the firm of Ree & Son, surveyors and auctioneers at Ware, had been employed by the assignees in making a survey of the estate, and in that capacity acquired a knowledge of its value.

The property now in question was advertised for sale by public auction, together with other property of the plaintiff, on the 21st October, 1856. The particulars stated the lot to be of the estimated annual value of 750*l.*, and that the age of the plaintiff was forty-seven years. Upon the life estate being put up for sale the highest bidder was Mr. Henry Page, of Ware, who bid 2860*l.* for the lot; but the assignees bought it in at 2890*l.*

The plaintiff, a certificated bankrupt who had compounded with his creditors, filed a bill impeaching a purchase from his assignees of part of the property by the solicitor to his assignees; but, from his cross-examination in Court it appearing in the opinion of the Court that the composition was fraudulent, and that after his bankruptcy he had himself purchased some of his real estate vested in his assignees, and had sued for and recovered for his own benefit monies due to him at the time of his bankruptcy, and not entered in his schedule or accounted for to his assignees or creditors, the Court dismissed the bill, but without prejudice to the rights of the assignees.

1863.
ADAMS
v.
SWORDER
—
Statement.

On the 23rd December, 1856, the property was again put up for sale by auction at the Saracen's Head, Ware. The particulars were stated as previously with regard to the freehold estate, and that two bonuses, amounting together to 118*l.* 10*s.* had been declared on the policy. The defendant Ree was declared the purchaser for the sum of 2020*l.*, which was inadequate.

The defendants Sworder and Ree admitted that it was agreed between them that Sworder should advance the money at the sale in case the defendant Ree bought, and that they should be jointly interested in the purchase, and bear the profits and losses equally. In the deed of conveyance from the assignees, dated 6th August, 1857, it was expressly recited that Sworder had advanced the sum of 2020*l.* to Ree. The conveyance was to Sworder, subject to redemption on payment by Ree of 2020*l.* and interest. The answer also admitted that the defendant Ree was the sole bidder for the life interest, but the defendants said it was not the fact that the sum was not three years' purchase for the life interest, and they made out the contrary by reference to the true annual value of the life interest.

The debts under the bankruptcy were about 95,600*l.*, and the assets about 60,000*l.*

In 1860 the plaintiff proposed to make a composition with his creditors, under the Act of 1849, at the rate of 6*s.* in the pound; and in pursuance of such proposal a sum of 500*l.* was in February paid by the plaintiff into the Bank of England.

By a deed dated the 14th March, 1860, and made between the plaintiff of the one part and the assignees of the other part, reciting, amongst other things, the adjudication in July, 1856, and that at a meeting of his creditors on the 6th January then last past the plaintiff made an offer of composition with his creditors, which was accepted; and that at another meeting on the 10th February nine-

tenths in number and value of the creditors then present agreed to accept the offer; and that by such offer the plaintiff and one James Mason agreed to pay to the creditors 500*l.* by way of composition, and by way of full discharge of all debts and claims due or claimed to be due from the plaintiff to his creditors under the bankruptcy; and an order of the London Court of Bankruptcy, dated the 10th February, 1860, giving liberty to the plaintiff to pay in the 500*l.*; and that the sum of 500*l.* had been duly paid to the official assignee; and that various sales had been made of the plaintiff's real and personal estate by the assignees; and that it had been agreed that, in order to protect and indemnify the assignees, "and all persons claiming under them," from all liability and risk incurred by them by reason of any acts or things done or authorised to be done by them; and in order to ratify and confirm all such acts and things: it was witnessed that the plaintiff thereby ratified and confirmed all and singular the sales, &c., entered into by the assignees; and thereby declared that every such sale, purchase, contract, agreement, &c., should be thenceforth as binding on him as if the bankruptcy had not taken place; and he thereby acquitted and released the assignees, &c.

On the 4th May, 1860, Mr. Commissioner Fane made an order whereby, after reciting the order of the 25th July, 1856, 500*l.* had been paid into the bank; and reciting also an indenture of release and indemnity to the assignees bearing date that day, which indenture had been executed by the bankrupt, and Mr. Lawrance, solicitor to the assignees, appearing and consenting to the order, it was ordered that the adjudication be annulled and the petition be dismissed; but the order was expressly without prejudice to any sale made, or other act, matter, or thing done by the assignees or otherwise under the adjudication, and also without prejudice to the right of the creditors to receive the said sum of 500*l.*, and any other sum in the

1863.
ADAMS
P.
SWORDEN
Statest. nt.

1863.
 ADAMS
 v.
 SWORDER.
 —
 Statement.

hands of the official assignee, by way of dividend or composition.

On the 9th of July, 1861, the plaintiff filed this bill impeaching the purchase by Swarder, and made certain amendments, but the assignees were not parties to the suit.

The defendant Swarder, by his answer filed the 5th October, 1861, denied the plaintiff's right to impeach the sale, and contended that, if he ever had any right to do so, such right had been lost by the release and indemnity of the 14th March, 1860, or by the delay which had taken place in instituting the present proceedings.

Argument.
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Mr. *Malins* and Mr. *Herbert Smith* opened the case for the plaintiff, and relied on the rule of law that prohibited a solicitor from purchasing from his client; in this case the property was purchased at a grossly inadequate sum.

Mr. *Bacon* and Mr. *Marten* appeared for the defendant Swarder.

Mr. *Hobhouse*, Mr. *Waller*, and Mr. *Newson* appeared for the defendant Ree.

Mr. *Hardy* watched the case for the acting assignees.

Mr. *Bacon*, on the evidence being read, cross-examined the plaintiff, who admitted that after his bankruptcy he lived in and about the neighbourhood of Ware. He knew Ree before the bankruptcy, and was on intimate terms with him. Since the bankruptcy he had frequently called at his house. He knew Ree was in possession of the garden part of the premises; knew that he had bought it at the sale. He knew what Ree gave for it; he never remonstrated. Ree said witness might live there again if he pleased. Witness told his

solicitor he did not know who the real owners of the property were, but thought he could get the receipts from the tenant. Witness went to James Mason, and got the receipts from him in May or June, 1861. They were dated 15th October, 1858. Witness was positive he got them in May or June, 1861.

That witness had brought an action against a person named Cobham for a sum of 60*l.*, which he advanced to him for the purchase of a share in the Town Hall, 1856. This the witness forgot to state to the assignees.

That witness had had a litigation with his nephew Samuel Adams for money advanced to the latter during his minority, to the extent of 997*l.* He had sued his nephew since the bankruptcy. The matter was referred to arbitration, and the balance was about to be paid. This did not appear on the face of witness's last examination in bankruptcy, but the accountant employed by the solicitors of the assignees knew all about it. The fact that the nephew owed this money did not appear in the account.

He also commenced an action against a person named Jordan for 200*l.*, which he owed him. This sum also was not stated in his schedule.

The witness further admitted that a Mr. Coker, after his bankruptcy, bought a field and paid 209*l.* for it, and witness paid him 80*l.* soon after the sale of Cannons, and the balance in June following. Coker bought as a trustee for him.

The witness said that his brother Thomas Adams had given him 100*l.* two or three times: he thought he gave him 200*l.* in the year 1857. James Gabriel, his brother-in-law, gave witness 200*l.*, and more in the year 1857. He stated that he claimed 10,000*l.*, part of a sum of 30,000*l.*, in a suit of *Kay v. Johnston*; he further admitted that six months ago he purchased a house for 210*l.* He had sworn to the truth of his last examination in bankruptcy.

1863.
 ADAMS
 v.
 SWORDER.
 —
 Argument.

1863.
 ADAMS
 v.
 SWORDER.
 —
 Argument.

Mr. Page was also cross-examined, and he stated he would have given 2500*l.* for the property, but did not bid at the second sale because he had received a letter from the solicitors of the assignees stating that they had no authority to take less than 3000*l.*

In the course of the argument, the following cases were cited on the question of the validity of the sale:—*Charman v. Charman* (a), *Wearing v. Ellis* (b), *O'Brien v. Lewis* (c), *Hatch v. Hatch* (d), *Pooley v. Quilter* (e), *Ex parte Morgan* (f), *Gresley v. Mousley* (g), *Ex parte James* (h), *Gipps v. Daniel* (i), *Stump v. Gaby* (k).

At the conclusion of the evidence, the VICE-CHANCELLOR, addressing the plaintiff's counsel, said, assuming that you establish the case alleged in the pleadings that this sale was improper, how can the plaintiff maintain this suit when his title depends on a composition which it is evident was fraudulently obtained? The assignees are not before the Court.

Mr. *Malins*—The plaintiff must proceed without assignees, because there were none. The conduct of the plaintiff in the matter of his bankruptcy was not what it ought to have been, but still that did not deprive him of his civil rights. As soon as the adjudication in bankruptcy was annulled the plaintiff resumed all his rights over the property. Because a plaintiff had once done wrong he was not for ever to be refused relief. In the case of *Sharp v. Taylor* (l), where the plaintiff sought an account of moneys which had been obtained by means of a violation of the fiscal laws, the same objection now taken was raised, that the plaintiff could not sue, but Lord Cottenham refused to listen to the objection. The

(a) 14 Ves. 580, 584.

(b) 6 De G. M. & G. 598.

(c) *Antè*, 221.

(d) 9 Ves. 292.

(e) 2 De G. & J. 327.

(f) 12 Ves. 6,

(g) 4 De G. & J. 78; a.c. 1 Giff. 450.

(h) 8 Ves. 337.

(i) 4 Giff. 1.

(k) 2 De G. M. & G. 623.

(l) 2 Phill. 801.

plaintiff was now in the same situation as if he had got the property back from persons to whom he had given a power of attorney, and which he had revoked.

1863
ADAMS
v.
SWORDER.
Judgment.

The VICE-CHANCELLOR :—

The plaintiff's right to sue, if any, depends upon the arrangement entered into by his creditors with him, and upon the deed of composition and release founded on the arrangement, which has been sanctioned by the Court of Bankruptcy. If it appears that the composition was not in fact made *bond fide* the plaintiff's right to sue does not exist. Now, from the evidence of the plaintiff himself it is quite plain that the agreement, which had been sanctioned by the Court, was entered into by the plaintiff after he had purchased for himself part of the property which passed under the bankruptcy. Early in the case I put it to the plaintiff's counsel whether it was possible to proceed with the suit without there being some one to represent the creditors. The plaintiff thought he could maintain the suit. But, supposing the plaintiff's claim to be made out, it seems clear that any benefit which may accrue to him under the suit ought to belong to the creditors who have received 6s. in the pound only of their debts. Had the estate been sold at double the value not one penny of the proceeds ought to have found its way into the pockets of the plaintiff. Under these circumstances the bill must be dismissed, but without costs, and without prejudice to the rights of the assignees in bankruptcy to take such proceedings as they may be advised.

1863.

March 9 & 11.

LODGE v. PRITCHARD.

Where one of two partners died and the other soon afterwards became bankrupt, the joint estate being administered in bankruptcy, and the separate estate of the solvent partner in this court—*Held*, that the joint creditors who were part paid in bankruptcy were not entitled to prove against the separate estate of the solvent partner *pari passu* with the creditors of the solvent partner.

Where a joint creditor takes the benefit of a decree for administering the estate of the insolvent partner and obtains an order for payment of his debt and costs, the executors' costs are prior charges, but where the executors have denied assets their costs are postponed to the debt and costs of the joint creditor.

PRIOR to the year 1837 Adam Lodge, of Liverpool, merchant, carried on business with Robert Graves and Cyrus Morrell as ropemakers, under the style of Graves & Company. Messrs. Moss & Co. were the bankers of the firm. In 1837 Adam Lodge died, having appointed Messrs. Pritchard, Colborn, and Lodge his executors, and at his death upwards of 7500*l.* was due to Messrs. Moss from the firm of Graves & Co. Soon after Mr. Lodge's death Graves, the surviving partner, became bankrupt, and on the 14th March, 1838, the whole of the bankrupt's estate was divided among his creditors. Messrs. Moss & Co. proved for their debt, and received a dividend amounting to 437*l.* 14*s.* 10*d.* out of the bankrupt's estate, leaving a balance due to them of upwards of 7000*l.* In 1842 Mr. Morrell filed a bill against the testator Adam Lodge's executors in order to obtain the benefit of a certain agreement which the Court declared established against the separate estate of Lodge.

Subsequently one of the residuary legatees under the will of Adam Lodge filed a bill to administer the testator's estate. The executors also filed a bill for the same purpose, and in 1850 Messrs. Moss & Co. also filed a bill to administer the testator's estate. The accounts were accordingly taken. In 1857 Morrell revived his suit, and filed a supplemental bill claiming the benefit of the administration suits, and that the testator's estate might be applied in payment of his debts. The conduct of the suits was given to Morrell. Moss and Morrell were the only simple contract creditors who proved. On taking the accounts the testator's estate was found to be insufficient to pay his debts.

1803.
 LODGE
 v.
 PRITCHARD.
 Argument.

Mr. *Mahns* and Mr. *S. Smith*, for Morrell, a simple contract creditor of the separate estate of Lodge, contended that the joint creditors could only claim against the surplus after the satisfaction of the separate debts: *Gray v. Chiswell* (a), *Ridgway v. Clare* (b). But even were the joint creditors entitled to proceed against the joint estate they would be entitled to payment according to priority: *Morrice v. The Bank of England* (c). As to costs, a simple contract creditor who filed a bill to administer the debtor's estate was entitled to his costs in priority over specialty creditors: *Larkins v. Paxton* (d). See also *Ex parte Kennedy* (e).

Mr. *Southgate* and Mr. *Druce* for the Messrs. Moss, creditors of the partnership.

In this case there was no longer any joint estate, and the creditor was therefore entitled to prove against the separate estate of Lodge. In *Cowell v. Sikes* (f) it was laid down that in a creditor's suit for administering the assets of B. a joint creditor of A. and B. was permitted to prove, A. having become bankrupt, there being no joint assets of A. and B. In *Ex parte Baureman* (g) it was declared that a joint creditor could prove against the separate estate where there is no joint estate and no solvent partner. The same doctrine was in effect laid down in *Sadler v. Jackson* (h). [*Wilkinson v. Henderson* (i), *Devaynes v. Noble* (k) were also cited.]

It was clear, therefore, that in the present state of circumstances the creditor was entitled to have his debt and costs satisfied out of the separate estate. The executors

(a) 9 Ves. 118.
 (b) 19 Beav. 111.
 (c) 3 Swanst. 573.
 (d) 4 M. & K. 320.
 (e) 2 De G. M. & S. 228.

(f) 2 Russ. 191.
 (g) 3 Dea. 476.
 (h) 15 Ves. 52.
 (i) 1 M. & K. 582.
 (k) 1 Mer. 530.

1863.

LODGE

v.

PRITCHARD.

Argument.

had denied assets, and it was clear the creditor's costs must be paid in priority to theirs.

Mr. Bacon and Mr. Kay.—The ordinary rule was that the executors were entitled to their costs as a prior charge, and there was no ground for departing from such ordinary rule. [*Tipping v. Power* (a), *Gaunt v. Taylor* (b), and *Bennet v. Going* (c) were cited.]

Mr. Greene, Mr. Welford, Mr. Bush, and Mr. Surragé appeared for the other parties.

Judgment.

The VICE-CHANCELLOR:—

Where there are two partners, and one has become bankrupt, and the other, a solvent partner, has died before the bankruptcy; and where there are joint debts of the partnership; where also there is to be in bankruptcy an administration of the joint estate, and in this Court an administration of the separate estate of the deceased partner, I consider it settled not only by the case of *Gray v. Chiswell*, but by subsequent decisions, that the joint creditors, who have received only part payment out of the joint estate under the bankruptcy, although they may come in as creditors upon the estate of the deceased partner, cannot come in *pari passu* with the separate creditors of the deceased partner. *Cowell v. Sykes*, unless upon very close examination, seems to disturb this view; but in fact it does not. The judgment of Lord Gifford in *Cowell v. Sykes* affirms the principle upon which *Gray v. Chiswell* was decided. He says, "The only authority on which it has been attempted to support this petition is the case of *Gray v. Chiswell*, where creditors having joint demands against two persons, of whom the survivor became bankrupt, were permitted to

(a) 1 Hare, 405.

(b) 2 Hare, 413.

(c) 1 Molloy, 129.

1803.
 LODGE
 v.
 PRITCHARD.
 Judgment.

prove against the estate of the one who was dead, and to come in for payment of what was due to them upon the surplus which remained after satisfying the separate debts. There the Lord Chancellor did not permit the joint creditors to come in *pari passu* with the separate creditors, and that part of the order which is relied upon as furnishing a precedent here does not seem to have been opposed." Lord Gifford stating that this was what was decided in *Gray v. Chiswell*, does not affect to disturb it. Lord Eldon, before whom the case of *Cowell v. Sikes* came, upon a petition which was not regularly a petition of appeal, gave his final judgment in these terms:—"In the circumstances of this case, the proceedings at law, and the state of the funds, I think the creditor may prove against the separate estate"(a). No doubt he may. But that does not prove that he is to be paid *pari passu* with the separate creditors. I find, in a case of *Ridgway v. Clare*, before the present Master of the Rolls, the principle is laid down exactly in the same terms as in *Gray v. Chiswell*. The Master of the Rolls says, "Suppose the surviving partner insolvent, either there is a bankruptcy or an insolvency, in either of which cases the case of *Gray v. Chiswell* is precisely in point; and there the joint creditors must resort, in the first instance, to the joint fund, and can only come against so much of the separate estate as will remain after paying the separate creditors"(b). That is a very recent decision, and affirms the principle so clearly that in my opinion it ought not to be disturbed. Lord Eldon and Lord Thurlow in the earlier cases express surprise that joint creditors were allowed to come in at all. In this case I have no doubt upon the subject; and if it be necessary to have a declaration, I shall declare that the joint creditor is entitled to claim only

(a) 2 Russ. 196.

(b) 19 Beav. 116.

1863.
LODGE
v.
PRITCHARD.

Judgment.

upon so much of the estate of the testator Lodge as shall remain after paying the separate creditors.

The costs of Moss & Co., and the costs of Morrell seem to me to stand on a very different footing. If Morrell's debt and costs were paid in priority to the claim of the executors there would remain quite sufficient to pay the executors, so that it is hardly worth while to raise the question. But Moss & Co. came here on a different footing. I think that where a joint creditor comes in to take the benefit of a decree to administer a separate estate, unless in an extraordinary case, the costs of the executor, as well as the payment of the separate debts, must come out of the assets before the joint creditor can get anything. There may be extraordinary circumstances of conduct which may raise a question between a joint creditor and an executor. But here there is nothing of the sort, the only irregularity being with reference to the payment of some of the debts of joint creditors. I have not a doubt that the executor's costs ought to come out of the assets before the joint creditor can get anything.

But I have an equally strong impression, on looking at the nature of the litigation, the decree obtained by Morrell, and his position as a litigant, that he is entitled to his principal money, interest, and costs, including all his costs in the litigation, before the executors. When a creditor, suing for his own debt, gets a decree of the Court to pay his debt and costs, that, being a specific order in his suit, involves the costs of his litigation. But if the executors do not admit assets, and there is to be an account taken, and thereupon assets are found, upon what principle can it be held that the executors who have denied that there are assets be allowed to have their costs before the creditor? I should be very sorry to disturb the general rule which entitles executors to have their costs of administering the assets to a testator. That general rule proceeds on a very plain

1863.
 LODGE
 v.
 PRITCHARD.
 Judgment.

principle, that before what has been entrusted to them and is in their hands is taken out of their hands they shall be indemnified against all expenses incurred in the discharge of their duty. That principle ought not to be disturbed. Another principle that ought not to be disturbed is, that when, in a complicated litigation for the administration of an estate, one creditor alone, upon one particular document which he holds, as in this case, has been obliged to come forward, not to be a litigant on behalf of himself and all other creditors, but to recover payment of his own debt, if after a litigation of some duration he succeeds in getting a decree of the Court which directs that the executors shall pay his debt and costs without any mention whatever of the costs of the executors, that decree is to be construed so as to give the creditor a right, which attaches upon all the assets, to have his debt and costs paid. That seems to me to be this case, and I do not see that I can accede to what is asked on the part of the executors as to Mr. Morrell, without depriving him of the benefit of the decree, which he seems to have got not without difficulty and not without expense. So the matter stands, clear of the question of the administration of the estate. The report as to the administration of the estate was not made in Morrell's suit. As to the report in the suit in which the executors' accounts were taken, and in which they undertake to show that in the very difficult position in which they were placed they have accounted for everything—as to that they are entitled to have their costs. But it is impossible to deal with the suit of *Lodge v. Pritchard* before Mr. Morrell is disposed of. *Lodge v. Pritchard* is for the general administration of assets. Morrell's suit is for the recovery of his own debt, and now the time has arrived when nobody denies that he is entitled to be paid. The question is simply as to costs; and I think I best follow the rules of this Court, so as to give their just rights to all parties, by

1868.
 LODGE
 v.
 PRITCHARD.
 Judgment.

holding that, in this particular case, Morrall has established his right to a decree for the taxation of all his costs of the litigation, and to the payment of his debt and those costs.

Feb. 17th.

On a bill by a *cestui que trust* against trustees and executors to make them liable for loss alleged to have been sustained by the sale of the testator's business and stock in trade against the will of the plaintiff, to one person instead of another, who, he alleged, would have made a higher offer, the Court held that, the trustees having acted with due deliberation, and in the honest exercise of their discretion, the trustees, were not liable, and gave them their costs of the suit.

SELBY v. BOWIE.

JANE SELBY, who up to her death carried on business as an outfitter at Portsmouth, by her will gave all her real and personal estate, of whatsoever kind, to the defendants, their heirs, executors, administrators, and assigns, upon trust, as soon as conveniently might be after her decease, to sell and absolutely dispose of the same by public auction or private contract, "for such price or prices in money, and under such stipulations or conditions as to title or otherwise, and generally in such manner in all respects as they or he, her said trustee or trustees for the time being, should think fit." The will also went on to provide "that her said trustees should be without responsibility for any loss or damage to be occasioned by" such sale or sales; and the money was to then form part of the personal estate. She then gave certain life annuities and pecuniary legacies, and bequeathed the whole of the residue to the plaintiff, her brother, for life, without power of anticipation, and after his decease as he should by will appoint, and in default of appointment to her own next of kin under the Statutes of Distribution.

Besides her business she was also seised of the fee simple of the shop and premises on which the business

was carried on, as devisee under the will of her brother John Charles Selby.

J. C. Selby had conducted the business for thirty-four years, and after his death in 1854 the testatrix continued it. The stock in trade at his death was very valuable, and the outstanding book debts amounted to about 14,000*l*.

Soon after the death of the testatrix a dispute arose between the plaintiff and defendants as to the disposal of the business. The plaintiff was anxious to sell it to Messrs. Fraser & Davis, on the ground that Fraser had been the foreman of J. C. Selby for twenty-six years prior to his decease; and that J. C. Selby before his death addressed a letter to him, in which he stated it had been his intention to continue in the business for a few years, and then hand it over to Fraser, and recommended him to carry it on for Mrs. Selby, and that she would reward him liberally.

Fraser managed the business for the testatrix until the 24th May, 1856, when a dispute having arisen he left her service, and started in business on his own account in partnership with Mr. John Davis. On the 22nd February, 1862, Messrs. Fraser & Davis wrote to the plaintiff offering to take the business; the stock at a fair valuation for ready money, and the premises at a rental of 140*l*. a year; or to purchase the premises at a fair valuation.

The trustees wished to dispose of the business to Messrs. Guy & Eames, who had been in the service of the testatrix, and who were also desirous of purchasing the stock in trade and paying for the same by instalments. These gentlemen also offered to rent the premises at 100*l*. a year; but upon being informed of the offer of Messrs. Fraser & Davis they sent a written proposal, dated the 27th February, offering to take the stock and shop furniture at a valuation to be made in the usual way, and to be paid for in cash on the 15th April, a firm in London

1862.

SELBY

v.

BOWEN.

Statement.

1863.
SELBY
v.
BOWIN.
—
Statement.

undertaking to make the payment. The proposal was that the premises, including fixtures and trade fixtures, were to be let for a term of fourteen years on a repairing lease, at a rent of 140*l.*, from Lady Day then next. The outstanding debts to be collected by the executors; Messrs. Guy & Eames to assist the executors in making up the accounts of the estate and collecting the debts, if required so to do, but not to have any right to interfere.

The plaintiff on the 14th March, 1862, filed this bill against the executors and trustees of the will of Jane Selby, praying that the trusts of the will might be carried into effect and the usual covenants taken. The bill also prayed for a receiver; also that the defendants might be restrained from selling testatrix's business and stock-in-trade, and from letting the business premises to Messrs. Guy and Eames, upon the terms of a memorandum of the 27th February, 1863, "or" (by amendment) "that defendants might be personally charged with the loss which the said testatrix's estate had sustained by reason of their entering into such agreement and selling the said business and stock-in-trade, and letting the said business premises on the terms therein mentioned.

The bill alleged that the offer of Messrs. Fraser and Davis was a mere offer, and that they would have made a much higher offer; that they were willing to give 200*l.* a year rent for the premises, and have purchased the goodwill, or to grant the plaintiff an annuity for life.

The defendants in their affidavit, dated the 19th March, denied that the plaintiff had ever insisted on the goodwill being sold. They further stated that they had fully and deliberately considered and discussed the subject, and came to the conclusion that, having regard to the magnitude of the debts, it would be most important to secure the services of Guy as being the only person who knew anything about the outstanding debts, and that it would be more advisable to sell to Messrs. Guy & Eames than to any other persons.

The plaintiff subsequently amended the bill.

The bill charged that the proposed sale to Messrs. Guy & Eames ought to be restrained, and that the offer of Messrs. Fraser & Davis ought to be accepted, or that the premises ought to be put up for sale by public auction, or otherwise offered for public competition.

On the 22nd March the plaintiff moved for an injunction to restrain the defendants from acting on the agreement of the 27th February, 1862, but his Honour refused to grant the injunction, but by consent directed a reference to chambers to ascertain whether it was for the benefit of the parties interested under the will that the said agreement should be performed. On the 7th May the defendants put in their answer, in which they alleged that the plaintiff had himself sanctioned the agreement with Messrs. Guy & Eames, and had assented to the relinquishment of a premium for the goodwill.

The plaintiff in his affidavit deposed that he did not believe that Messrs. Guy and Eames had the means of carrying the agreement into effect. The affidavit also set forth the circumstances under which he objected to the course pursued by the defendants.

The chief clerk on the enquiry certified that the property would be more advantageously disposed of by private contract than by public sale, but that independently of the question whether Messrs. Guy & Eames, from their intimate knowledge of the affairs of the testatrix, might not be considered as the most eligible purchasers, the value of the annuity of 140*l.* was not commensurate with the risk of loss that might be sustained by the estate from the result of further litigation that would ensue upon a repudiation of the agreement.

On the 10th July, upon a motion on behalf of the plaintiff to vary the certificate, His Honour made no order except that the costs of the application be costs in the cause.

1863.
SELBY
v.
BOWIE.
—
Statement.

1863.

SELBY

v.

BOWIE.

Argument.

Mr. *Malins* and Mr. *Morris* for the plaintiffs.

The evidence showed that the defendants took no steps to ascertain whether more advantageous terms could not have been obtained by them than those they agreed on the 27th February, 1862, to accept. Messrs. Fraser and Davis never had an opportunity of advancing beyond their first offer, or they would have done so. There was therefore a loss arising from the precipitate and arbitrary conduct of the defendants, for which they were responsible. In *Taylor v. Tabrum* (a), trustees who were directed to sell an estate as soon as conveniently might be after their testator's death by the desire of one of the *cestuis que trust* refused an offer for 6,600*l.*, but afterwards sold the property 3,600*l.* The Court charged them with the loss, but as their conduct had not been perverse, gave them their costs. That view of the law was adopted by the Lord Chancellor in *Harper v. Hayes* (b). The principle laid down was that it is the duty of trustees to use all diligence to obtain the best price for the property.

Here the defendants wholly disregarded the wishes of the *cestui que trust*, to which within certain limits they were bound to attend, and agreed to sell the property at a lower price.

Judgment.

The VICE-CHANCELLOR:—

The case has been now fully considered, and upon the evidence I think it has been clearly shown that having regard to all the circumstances which led to the agreement of the 27th February, 1863, the conduct of the defendants cannot be impeached. It appears that they acted *bona fide* and in a careful and proper way. There was in fact no great disparity between the two offers made. The difference between them was not considerable, and on the

(a) 6 Sim. 281.

(b) 2 De G. F. & J. 542—548; 8. C. 2 Giff. 210.

question which of the two was the most advantageous there might be an honest difference of opinion. Moreover there is a conflict in the evidence whether the plaintiff insisted on the point which constituted the principal difference between them. But however that may be, this seems clear that the defendants *bonâ fide* and with an honest desire to do their duty entered into the agreement of the 27th February, 1862, and they are entitled to the favourable consideration of the Court.

It has been contended that the defendants refused to pay proper attention to the plaintiff's wishes. I am not aware of any authority which establishes the proposition that, where there are two offers equally advantageous, one of which is preferred by the *cestui que trust* that it is the duty of trustees, against their own opinion, to accept that offer. In this case, however, the evidence fails to support that part of the case on which the plaintiff relies. The defendants must have their costs in the usual way.

1863.
SELBY
v.
BOWIE.
—
Judgment.

1862.

December 11.

PARKER v. NICKSON.

Where the bill prayed that the rights of all parties interested might be declared, and set forth the testator's will and codicil, and averred that the defendant was untruly described in the codicil as testator's next of kin and heir-at-law, and that he had obtained probate on an untrue allegation that the executors were dead, there being no distinct averment of the character in which the plaintiff claimed—a demurrer was allowed with leave to amend.

THE bill in this case alleged that Samuel Newns, by his will dated the 3rd December, 1832, directed his personal estate to be sold and the proceeds to be applied in discharge of two mortgage debts of 1000*l.*, one of which was secured to James Chapman and others,' upon the security of hereditaments adjoining St. George's Road, Manchester, and the other to Miss Sarah Pauldon, upon the security of hereditaments adjoining Lloyd Street, Chorlton-upon-Medlock, Lancashire. The testator devised the said Lloyd Street property, of which he was seised in fee, subject to a rent, and the residue, if any, of the said sum of 1000*l.*, and the residue, if any, of his personal estate, to Thomas Airey and Thomas Bromiley, their heirs, executors, and assigns, upon trust to pay the rents and profits to his wife Elizabeth for life, and after her decease, then as to one moiety of his said estate upon trust for his brother John Newns, his heirs, executors, administrators, and assigns; but in case he should not be living at testator's death, then (subject to the widow's life estate) upon trust for the children of John Newns, as therein mentioned, with a trust similar to the trusts of the other moiety. The testator directed the other moiety to be held, subject as before, in trust for his brother William Newns, his heirs, executors, administrators, and assigns; but if he should not be living at testator's death, then, subject as before, upon trust for his children as therein mentioned, with a trust similar to that of the former moiety. Testator devised his St. George's Road estate, of which he was seised in fee, to his wife Elizabeth, her heirs and assigns, subject to the payment of the said mortgage; but if Elizabeth

Newns should die in his lifetime, then he devised the said estate, subject to the debt as aforesaid, upon similar trusts to those which he had declared respecting the Chorlton-upon-Medlock estate.

1862.
PARKER
v.
NICKSON.
Statement.

The bill alleged that the testator's estate was subject to several mortgages. He died in 1845. The survivor of the two executors died in 1854. John Newns, the testator's brother, died in the lifetime of the testator without issue. Samuel Newns also died before the testator, leaving three children plaintiffs in the suit.

Elizabeth Newns, the widow, survived the testator and gave her real and personal estate to the defendant H. Burton.

The following were the material allegations of the bill:—

Paragraph 21. Under the circumstances aforesaid the plaintiffs became and are respectively absolutely entitled to the said plot of land in or adjoining to Lloyd Street, and the said plot of land adjoining to Gore Street and Carter Street, and the buildings thereon respectively, and the rents and profits of the said several premises accrued since the death of the said Aldcroft Phillips.

Paragraph 22. The plaintiffs, or any of them, never heard that the said Samuel Newns in any manner revoked or altered his said will, and they supposed that he had never done so; but on the 15th July, 1861, the defendant Thomas Nickson obtained probate of the said will, and also of the codicil hereinafter set forth, upon an allegation, which is untrue, that the said Thomas Airey and Thomas Bromiley died in the lifetime of the said Samuel Newns, and in consequence of the said allegation no citation was issued to any person entitled to dispute the grant of such probate to the defendant Thomas Nickson.

Paragraph 23. The said codicil is in the words and figures following, that is to say:—"I, Samuel Newns, of Greenhays, in the parish of Manchester, in the county of

1862.
 PARKER
 v.
 NICKSON.
 —
Statement.

Lancashire, acknowledge Thomas Nickson my second cousin, shopkeeper, No. 21, Chester Street, Chorlton-upon-Medlock, in the parish of Manchester, in the county of Lancashire, to be my next of kin and heir-at-law to all my real and personal property situate in the parish of Manchester in the county of Lancashire. If my wife survives me, in two years after my wife's death my second cousin Thomas Nickson and next of kin to take possession of all my real and personal property, and to pay all my just debts according to my will. Thomas Nickson, my second cousin, is my next of kin and heir-at-law, as my brother John is dead, and has left no issue. The reason I give Thomas Nickson this written document is, I am afraid my executors will not put my will into court, as they wanted me to burn my will. Executed this third day of February, in the year of our Lord 1843.

“ Witnesses—

The mark of

“ Samuel Ankers.

✕

“ John Jones.

SAMUEL NEWNS.

Paragraph 24. The allegation made by the said codicil, that the defendant Thomas Nickson is the heir-at-law and next of kin of the said Samuel Newns, is without any foundation.

The bill then went on to allege that in the month of October, 1862, the defendant Thomas Nickson caused the Lloyd Street and Gore Street property to be advertised for sale; that on the 29th October the properties were sold to the defendants Joseph Thompson and Robert Briggs Lomas for the sums of 1460*l.* and 1070*l.* respectively; but the purchases were not yet completed.

That Thomas Nickson pretended that under the codicil he was entitled to sell in order to satisfy incumbrances; whereas the plaintiffs charged that all the incumbrances and debts were satisfied except the alleged

balance, which was altogether unascertained, and that neither the defendant Jane Phillips nor the plaintiffs desired a sale.

1862.
PARKER
v.
NICKSON.
Statement.

“ That the defendant Thomas Nickson is in a low condition of life and in poor circumstances, being the occupier, at the weekly rent of 4*s.* 6*d.*, of a small house and shop in Chester Street, Chorlton-on-Medlock, for the accommodation of factory operatives, who bring their food there to be cooked, and he has no other employment; and if the defendant Thomas Nickson be permitted to complete the sale of the said plot of land in or adjoining to Lloyd Street, and the buildings thereon, and to sell the plot of land in or adjoining to Gore Street and Carter Street, and the buildings thereon, the purchase-moneys for such sales, if received by him, will be wholly lost to the plaintiffs.”

The bill then prayed that the rights and interests of all parties in the said properties might be declared; for an account of what, if anything, was owing on the mortgage; that upon payment of the balance (if any) by the plaintiffs, the mortgagee might be decreed to convey to the plaintiffs as they should direct.

The bill also prayed for an injunction against Thomas Nickson to restrain his intermeddling with the assets and completing the sale of the the property.

Mr. *Karslake*.—The bill contains no allegation of the plaintiff's title beyond the general statement in the 22nd paragraph. The defendant having obtained probate of the will, it was submitted that this general allegation was insufficient to disprove the title of the defendant.

Argument.

[The VICE-CHANCELLOR.—I think I had better hear the plaintiff's counsel.]

Mr. *Mahns* and Mr. *L. Bird* for the bill.

The plaintiffs had set forth the documents which dis

1862.
 PARKER
 v.
 NICKSON.
 Argument.

closed the title under which they claimed, and that was sufficient. The only title of the defendant arose from a mistaken recital in the codicil, but there could be no valid devise by implication from the mere recital of an erroneous conception of right: *Dashwood v. Peyton* (a), *Adams v. Adams* (b), and *Jackson v. Craig* (c). The only power the defendant Nickson had to sell was, in the event of there being debts and there being none, and there being no legal title in him, he could make no title: *Stroughill v. Anstey* (d).

Judgment.

The VICE-CHANCELLOR:—

I think it is impossible from the allegations in the bill to say under what title the plaintiffs sue; nor can I understand, with the degree of precision required in pleading, in what character the defendant Nickson is brought before the Court. It is impossible to read the pleadings without seeing that there is a question of construction to be argued; but I do not think it possible upon the bill as now framed to decide that question upon demurrer. It would be very convenient if the question could be so decided, but I should require a great deal more argument than I have yet heard to show me that the plaintiffs in whatever character they claim are not completely displaced by the codicil. I cannot understand now, after having heard counsel on both sides, whether the plaintiffs treat the codicil as conferring a valid title as devisee and legatee upon the defendant Nickson. Nor is he in any passage that I have been able to find named as legal personal representative; for it is said he has obtained probate improperly. There is no such allegation in the bill. It is necessary that the plaintiffs should state clearly, distinctly, and with precision, the nature of the

(a) 18 Ves. 27.

(b) 1 Hare, 537.

(c) 15 Jur. 811.

(d) 1 De G. M. & G. 635.

title under which they claim, and in what character they claim. The more convenient course on this occasion will be to allow this demurrer with costs, and give leave to amend.

1862.
PARKER
v.
NICKSON.
Judgment.

PARKER v. NICKSON (a).

1863.
April 25.

THE defendant now moved :—

That the re-amended bill in this suit which was filed on the 20th day of February, 1863, might be ordered to be taken off the file as not having been authorised by the liberty to amend given by the Court, on allowing the demurrer filed by the defendant to the original bill, and that it might be referred to the proper taxing-master to tax the defendant Thomas Nickson his further costs of the suit other than and beyond the costs of the order of the Vice-Chancellor, dated the 11th December, 1862, directed to be taxed, and the costs of the said appeal by the order of the Lord Chancellor, dated the 23rd January, 1863, also directed to be taxed, and that the plaintiffs be ordered to pay such further costs to the defendant Thomas Nickson, or in case the Court should not order the said re-amended bill to be taken off the file, then that such further costs as aforesaid might be ordered to be taxed and paid by the plaintiffs to the defendant Thomas Nickson, and that the said defendant's time for answering the said re-amended bill might be enlarged or extended

A bill being by leave granted on hearing the demurrer amended by impeaching the codicil as being executed by the testator while in a state of mental incapacity. The defendant thereupon moved to dismise the amended bill as being inconsistent with the original bill, but the Court refused the motion, and directed the costs to be costs in the cause.

(a) See the preceding case, by the Lord Chancellor on the which was affirmed an appeal 23rd January, 1863.

1863.
 PARKER
 v.
 NICKSON.
 Statement.

until such further costs as aforesaid should have been paid, and that the plaintiffs might be ordered to pay to the defendant Thomas Nickson his costs of and incident to the present application, and the order to be made thereon."

The plaintiff (paragraph 29) in the amended bill alleged that the said codicil was not in fact the testator's testamentary disposition as regarded real estate, and that the plaintiffs would immediately take proceedings at law to impeach the validity of the codicil as regarded real estate, but they were unable to do so without the aid of this Court, by reason of there being an outstanding legal estate.

The bill prayed that an issue of *devisavit vel non* might be directed to try the validity of the codicil as a devise affecting real estate.

Argument

Mr. *Karslake* for the defendant.

The plaintiffs got leave to amend the bill, but not to make a new case and a new bill inconsistent with the original bill. In the original bill they claimed under the will and codicil, in the amended bill they impeached the codicil as invalid. This could not be permitted under the ordinary leave to amend. In *Mavor v. Dry* (a), the plaintiff by his original bill impeached a deed, and after the answer was put in he obtained the usual order to amend under which he amended the bill by endeavouring to establish the deed. The defendant moved to dismiss the amended bill, and the Court made the plaintiff pay the costs of the original bill and of the motion. In *Deniston v. Little* cited in *Lindsay v. Lynch* (b), the amended bill was dismissed. In *Allen v. Spring* (c) the same principle was acted on. Secondly it was submitted that the plaintiff ought to have proceeded in the Probate Court.

(a) 2 S. & S. 113. (b) 2 Sch. & L. 12 (note). (c) 22 Beav. 615.

[*Severn v. Fletcher* (a) and *Cresy v. Bevan* (b) were also cited.]

The VICE-CHANCELLOR, without calling upon the plaintiff's counsel:—

1863.
PARKER
v.
NICKSON.
Judgment.

There is no authority for this application. The plaintiffs obtained leave to amend generally by an order which prescribed no particular form of amendment.

The authorities cited seem to have no application to the case before the Court. They decide that a plaintiff under an authority to amend is not at liberty by his amended bill to claim a new estate by a new title; but they do not say that a plaintiff is not at liberty by his amended bill to claim the same estate by another and more accurate statement of the same title. In *Mavor v. Dry* the Court did not order the bill to be taken off the file.

With regard to the costs the order asked by the notice of motion would be improper. In *Dent v. Wardel* (c), the costs were ordered to be paid by the plaintiff; but they only amounted to 5*l*. In *Allen v. Spring* the Master of the Rolls laid down a general rule at first sight not apparently consistent with the decision in *Mavor v. Dry*, but on due examination of the language it is plain that all the Master of the Rolls meant to decide was that if a plaintiff by amendment makes a case inconsistent with the case made by the original bill, he must indemnify the defendant for the costs occasioned by such a proceeding. This is really what was done in *Mavor v. Dry*. The defendant is entitled to all his costs down to the time when the demurrer was allowed, but the costs of this application must be the costs in the cause.

(a) 5 Sim. 457.

(b) 13 Sim. 354.

(c) 1 Dick. 339.

1863.

April 30.
May 1.

CROSKEY v. THE BANK OF WALES.

Where a plaintiff filed a bill, on behalf of himself and all other shareholders except the defendants, against the company and the directors and solicitors, alleging misrepresentation and suppression, and praying for repayment of the deposits—a demurrer was allowed without leave to amend.

The payment required on allotment is not a call.

Where the memorandum of association empowered the directors, without further authority from the shareholders, to pay a specified sum for the costs and expenses of the promoters—*Held*, on demurrer, that a payment without taxation was not improper.

THIS was a general demurrer for want of equity.

The bill was filed by Joseph Rodney Croskey, on behalf of himself and all the other shareholders in the Bank of Wales (Limited) except the defendants, against the bank and the directors (13) and solicitors (3).

The bill alleged that in 1862 a joint-stock banking company, limited, was projected by the name of the Bank of Wales. By the memorandum of association it was provided as follows:—

That the registered office of the company is to be the established one in England.

That the objects for which the company is to be established are the transaction of every kind of banking business, &c.

That the nominal capital of the company is 1000*l.*, divided into ten shares of 100*l.* each, to be increased from time to time, if need be, to an amount not exceeding 2,000,000*l.*, by the creation of 19,990 additional shares of 100*l.* each, or of such smaller number of such shares as may from time to time be deemed expedient. And the several persons whose addresses were subscribed thereby declared their desire to be formed into a company, in pursuance of the said memorandum of association, and they respectively agreed to take a number of shares in the capital of the company set opposite to their respective names.

The memorandum of association is dated the 20th of October, 1862, and was signed by two of the defendants, Charles Parke and D. J. Hoare; by T. Loader, J. Hunt,

B. Gregory, E. D. Chattaway, and J. W. Trenery, for one share each, and by the said C. Parke, as the solicitor of the company; with the said memorandum of association were registered articles of association, whereby it was provided that Table (B) in the Schedule to the Act of 1856 should not apply to the said company.

1863.
CROSBY
v.
THE BANK
OF WALES.
Statement.

The bill then set out certain of the articles, as follows:—

“7. The board may from time to time increase the existing capital to any amount, not exceeding 2,000,000*l.*, by the creation of any number of new shares of 100*l.* each, not exceeding 19,990 in the whole, upon such terms, and either with or without preference or priority as regards dividends or otherwise over the shares in the then existing capital, as the directors deem expedient.

“8. Provided that no resolution of the directors for the creation of any new shares beyond 9990 shares, or for the creation of any new shares whatever upon any terms other than those on which the ten shares mentioned in the 5th article of the memorandum of association have been issued, shall be valid until it shall have been ratified and confirmed by a resolution passed by the shareholders present personally, or by proxy, at a meeting convened for that purpose, and at which there shall be present personally thirty or more persons who have been shareholders for at least three months next previous to such meeting.

“9. Whenever it has been duly resolved to increase the capital, the directors shall carry the resolution into effect, in such manner as they deem most expedient; subject, nevertheless, to the provisions of the statutes and these presents, and to any special directions (if any) given in reference thereto by the meeting at which the resolution of the board may have been ratified and confirmed as aforesaid.

“10. Any capital so created shall, except so far as is

1863.
CROSKY
v.
THE BANK
OF WALES.
Statement.

otherwise directed by any such special direction, be subject to these presents, in the same manner as if it had been part of the original capital.

“ 11. An application for shares in the company, signed by or on behalf of the applicant, and followed by an allotment of any shares thereon, shall be deemed to be an acceptance of such shares within the meaning of these articles, entitling the company to place the name of the allottee on the register of shareholders in respect thereof; and every person who thus or otherwise accepts any share, and whose name is on the register of shareholders, shall, for the purpose of these articles, be a shareholder.

“ 29. The board may from time to time, but subject to the conditions hereinafter mentioned, make such calls upon the shareholders in respect of all monies unpaid on their shares as the board think fit, and every shareholder shall be liable to pay the amount of every call to the persons and at the time and place appointed by the board.

“ 30. Twenty-one days' notice at the least shall be given of the time and place appointed by the board for the payment of every call.

“ 31. No call shall be made until the expiration of three months from the incorporation of the company, nor shall any call exceed 5*l.* a share, and at least three months shall intervene between the time appointed for the payment of two successive calls.

“ 32. A call shall be deemed to have been made at the time when the resolution authorizing the call was passed, but no call shall be made beyond the amount of 25*l.* per share, except by a resolution passed by three-fourths of the directors, and confirmed by another resolution passed by a majority of the directors present at the next meeting of the board.

“ 64. Every shareholder who has been duly registered for six months previous to any meeting shall be entitled to

vote at such meeting, and shall have one vote in respect of each and every share held by him, provided that no single shareholder shall have more than twenty votes.

"71. The first directors, and any other directors appointed by the board, shall continue in office until the ordinary meeting in the month of March, 1864, and until others are appointed as hereinafter is mentioned.

"100. In their management of the business of the company, the directors, without any further power or authority from the shareholders, may do the following things, viz. :—

1. In consideration of the great labour, expenses, and risk which Charles Parke, one of the persons who has signed the memorandum and articles of association, has incurred and been put to in and relating to the promotion and formation of the company, and in registering the memorandum and articles of association thereof, in case and so soon as the capital of the company shall be increased to 500,000*l.* or upwards, and shares to that amount have been subscribed for and allotted, shall pay to the said Charles Parke, his executors, administrators, or assigns, the sum of 6000*l.*
2. They shall also, when and so soon as shares to the amount of 500,000*l.* shall have been subscribed for, pay out of the funds of the company all costs, charges, and expenses not hereinbefore provided for, and which shall have been or shall be hereinafter incurred or sustained in or about the establishment of the company, or the obtaining the capital, or in any manner in relation thereto."

By articles numbered 138, 139, and 141, Charles Parke was declared to be first and present solicitor, the defendant Deane John Hoare managing director in London, and Benjamin Gregory secretary of the company.

The memorandum and articles of association were

1863.
CROSKY
v.
THE BANK
OF WALES.
Statement.

1863.
 CROSKY
 v.
 THE BANK
 OF WALES.
 Statement.

registered on the 20th October, 1862, and thereupon a certificate of incorporation was granted.

By a memorandum indorsed on the memorandum of association, it was stated that by a resolution dated the 20th January, 1863, the capital of the company was increased to 1,000,000*l.* by the creation of 9990 new shares of 100*l.* each, similar in every respect to the ten shares mentioned in the fifth article of the memorandum of association.

The bill alleged that it did not appear, nor had the plaintiff been able to ascertain, by whom such resolution was alleged to have been passed.

The bill then set out the prospectus issued the 22nd January, 1863, stating the formation of a new company as follows:—

“BANK OF WALES, LIMITED.

“Capital 100,000*l.*, in 10,000 shares of 100*l.* each; first issue 500,000*l.*, in 5000 shares.

“Deposit on application 1*l.* per share, and on allotment 1*l.* per share. No call to exceed 5*l.*, and an interval of not less than three months between each call.

“It is not intended to call up more than 25*l.* per share.”

The prospectus set forth at length the names of the officers of the company, and proceeded thus:—

“The continuous and increasing development, for more than half a century, of native wealth in the mines, the trade, and the agriculture of the principality of Wales, has by no means been accompanied by a corresponding expansion of banking accommodation in the district. In the large towns, as well as the centres of population and enterprise in the mining counties, there has universally been felt and expressed the want of a joint-stock bank for Wales. The present banks which carry on business in the towns of North and South Wales, more or less remote, being restricted in capital and limited in con-

nexion, fail to give that general support, or to afford that well-grounded and extensively ramified basis for trading transactions which the special operations of a well-regulated joint-stock bank can alone secure to its customers.

“Negotiations are pending, and nearly completed, for the purchase of important private banking concerns in the principality, and promises have been received of accounts to be opened with the Bank of Wales, of themselves sufficient to establish an extensive and valuable business. The Bank of Wales will have branches at Cardiff, Newport, Swansea, Abergavenny, Monmouth, Merthyr Tidvil, Aberystwith, Bangor, and other important towns.

“The directors have made arrangements by which all preliminary expenses, legal charges, printing, advertisements, and all other costs whatever up to the allotment of the shares, shall not exceed the sum of 6000*l*.”

The bill then alleged as follows:—

That “upon the faith of the representations contained in the said prospectus, and particularly that the persons named therein were to be the directors of the said banking company, and that the negotiations for the purchase of the private banking concerns in the principality therein referred to (one of which was stated by the defendants to be that of Messrs. Crawshay, Bailey, & Co., of Newport, Monmouthshire) were nearly complete, and that all the preliminary expenses connected with the said company prior to its commencing business were not to exceed the sum of 6000*l*., and that the shares then to be issued were the first shares issued in the said company, and having no reason to believe, from the prospectus or otherwise, that the allottees of the shares would not have the control of the company’s affairs, the plaintiff applied for 200 shares in the said company, and paid the sum of 200*l*., being the deposit of 1*l*. per share thereon, to the bankers of the said company.”

1863.
CROSBY
v.
THE BANK
OF WALES.
Statement.

1863.
CROSEY
v.
THE BANK
OF WALES.
Statement.

That two of the defendants, Wm. Macnaughtan and John Hackblock, pretend that before the allotment of shares, and on the 2nd February they, for the first time, discovered that, instead of 6000*l.* being the maximum amount to be paid for securing the advantages held out by the said prospectus, the sum of 10,000*l.* was to be paid by the Bank of Wales as commission to an agent for the introducing the private banking concern of Crawshay, Bailey, and Co. to the Bank of Wales, in addition to the very large amount required for the goodwill of the said business, and that thereupon the said defendants intimated to the other directors that they would, under the circumstances, retire from the position of directors of the company. The said W. Macnaughtan, however, attended the allotment on the 2nd February.

The bill alleged that it was well known that the retirement of Macnaughtan and Hackblock would involve the failure of the negotiations for the purchase of the said private banking concern, and that a large number of the applications for shares would, when it was publicly known, be withdrawn.

Accordingly, and in order to prevent such withdrawal, the remaining directors determined to meet on the following day, the 3rd of February, and to complete the allotment before the retirement could become known. They accordingly met early on the morning of the 3rd, and proceeded with the allotment; and whilst so proceeding a formal letter from the said defendants William Macnaughtan and John Hackblock was delivered to the said defendants the remaining directors, of which the following is a copy:—

“ To the Board of Directors of the Bank of Wales
(Limited).

“ Gentlemen,—We consented to join your Board upon the condition that the sum of 6,000*l.* should include all

preliminary expenses up to the allotment of shares, and a prospectus was issued to this effect with our names added to your list of directors. Finding on the minutes of the the earlier proceedings an engagement for 10,000*l.* additional expenses, which is not consistent with our agreement, we retire from your board, and request our names may be struck out of your circulars and advertisements, and that our withdrawal from your board may be made known to the applicants for shares before any allotment is made.

“ We beg herewith to withdraw our applications for shares, and to request the return of our deposits.

“ We are, Gentlemen,

“ Your obedient servants,

(Signed)

“ WM. MACNAUGHTAN.

“ JOHN HACKBLOCK.”

1863.
CROSKY
v.
THE BANK
OF WALES.
Statement.

The defendants the remaining directors well knew that, so soon as the said letter should become publicly known, a great many applications for shares would be withdrawn; and it was, therefore, of the utmost importance to them, in the furtherance of their scheme, that an allotment of the requisite number of shares should be made before the same became known. Accordingly, every possible exertion was used to complete such allotment during that day, and the parties were engaged till two o'clock the following morning in completing such allotment, and in filling up and posting notices thereof to the different applicants, no one of whom was aware at that time of the retirement of the said defendants William Macnaughtan and John Hackblock. No shares were allotted to the last-named defendants, but the 200 shares for which the plaintiff had applied were allotted to him.

¶ The letter of the said defendants William Macnaughtan and John Hackblock appeared in the London newspapers of the 4th of February, 1853, and thereupon divers persons gave notice to the company of the withdrawal of

1863.
 CROSKY
 v.
 THE BANK
 OF WALES.
 Statement.

their application for shares, and desired the return of their deposit; and on the following day, the 5th of February, 1863, such persons received from the secretary of the said company a letter, of which the following is a copy:—

“ Bank of Wales (Limited).

“ 69, Cornhill, London, 5th February, 1863.

“ Sir,—I beg to acknowledge the receipt of your letter of the 4th instant, which has been laid before the Board of Directors, and I am instructed to state that I have no power to comply with your request, inasmuch as the shares have been allotted in due form.

“ I am, Sir, your obedient servant,

“ BENJAMIN GREGORY, Secretary.”

The bill then set forth a letter to Macnaughtan and Hackblock, from the secretary of the company, in which the latter stated that a negotiation had been opened for the purchase of a private banking business, said to be worth 20,000*l.*, and on which the commission was asked by the agent of 10,000*l.*, but denying that any engagement for making such payment existed. The secretary offered to produce the minute-book, and noticed that the letter of resignation was dated the 2nd instead of the 3rd. Messrs. Macnaughtan and Hackblock sent the following reply:—

“ The City Bank, Threadneedle Street,

“ London, E.C., February 5, 1863.

“ Bank of Wales (Limited).

“ Sir,—

“ We are not aware that it is necessary for us to notice Mr. Benjamin Gregory's letter in your paper of to-day, except to admit the inaccuracy in the date of our letter of resignation, inadvertently dated the 2nd instead of the 3rd instant, and which was delivered and read to the Board of Directors before any allotment was made.

"We beg to hand you herewith one of the prospectuses issued to the public, in which you will observe a clause referring to negotiations pending and nearly completed. The cause of our resigning, as already stated, was, that when joining the Board we were not informed that such negotiation could not be completed unless 10,000*l.* were paid from the funds of the shareholders, and which 'preliminary' liability left us no other course of action than that which we adopted.

"The public is not to understand that the said 10,000*l.* was for the purchase of the goodwill of the banking business alluded to in the prospectus, but solely as a bonus to another party for the introduction.

We are, Sir, your obedient servants,

"WM. MACNAUGHTAN.

"JOHN HACKBLOCK."

4,955 shares only were allotted in the said company. The shares numbered respectively 1 to 50 both inclusive were allotted to one Mr. Prior, and the shares subscribed for by the said memorandum of association were treated as non-existing shares. In fact, no shares were allotted to, or registered in, the names of either of them, the said Thomas Loader, John Walter Trenery, and Benjamin Gregory, prior to the 31st of March, 1863, nor were there prior to that day more than 4,955 shares registered in the said company, or on which the deposit or any call had been paid. The call of 1*l.* per share was paid by the plaintiff and other shareholders on allotment, in ignorance of the fact that the then issue was not the first issue, and of the special provisions in the Articles of Association.

On or about the 31st day of March, 1863, the name of the said Thomas Loader was placed on the share register as the holder of one share, numbered 4,956, and the said John Walter Trenery as the holder of another share, num-

1863.
CROSBY
v.
THE BANK
OF WALES.
Statement.

1863.
 CROSEY
 v.
 THE BANK
 OF WALES.
 Statement.

bered, 4,957, and the said Benjamin Gregory, the secretary of the said company, as the holder of forty-three shares, numbered respectively 4,958 to 5,000, both inclusive, although neither of the said parties had applied for shares previous to the allotment, or paid any deposit; and the plaintiff shows that their names were placed on the share register, not as the *bonâ fide* holders of the said shares, but merely as trustees for the defendants, from whom they had received an indemnity, and in order to give an appearance of legality to the illegal proceedings of the defendants; and in furtherance of this scheme the plaintiff shows that it is made to appear by the share register that such shares were registered in the respective names of the said parties on the said 3rd day of February, 1863. At the time the aforesaid shares were registered in the names of the said Thomas Loader, John Trenery, and Benjamin Gregory, the market price of shares in the said company was 5s. per share, or 1¼ discount.

Previous to the issue of the last-mentioned shares, and whilst the number of shares on the register and allotted only amounted to 4,955, the defendants the remaining directors of the said company paid out of the moneys of the said company to the defendant Charles Parke, and also to the defendants Alexander Crosley and William Burn, who, by virtue of some arrangement between the said last-mentioned three defendants, had, as between themselves, become interested therein, the sum of 6000*l.*, by way of promotion-money, and for costs and expenses in reference to the getting up of the said bank, without any bill of costs having ever been delivered by the said defendant Charles Parke, or any statement showing how the said sum was made up; and the plaintiff shows that in fact all the costs, charges, and expenses connected with the formation of the said company could not and did not exceed the sum of 500*l.*; and the plaintiff charges that he applied for shares in the

said company on the faith of the said representation in the said prospectus that all the preliminary expenses connected with the formation of the said company, including the purchase of the private banking concerns therein referred to, should not exceed the sum of 6000*l*.

The plaintiff charges that such payment to the said defendants Charles Parke, Alexander Crosley, and William Burn was a fraud upon the shareholders in the said company, and that all the defendants hereto were fully aware of the circumstances and parties to such fraud, and they ought respectively to be ordered and decreed to repay the said amount with interest thereon. The plaintiff also charges that an arrangement existed between the said defendant Deane John Hoare and the said defendant Charles Parke, by virtue of which the said defendant Deane John Hoare was also interested in the said sum of 6000*l*., and the said last-named defendant has in fact received and been paid part thereof; and the plaintiff charges that it was in order to secure such amount that the allotment of shares in the said company was hurried on and completed before the withdrawal of the said defendants Messrs. William Macnaughtan and John Hackblock became publicly known. The said defendant Deane John Hoare was chairman of the board during the allotment, and signed the same.

The defendants the directors of the said company, on the 17th day of March, 1863, assumed to make a further call of 5*l*. per share, payable on the 30th day of April instant. A great many dealings in the shares of the said company had taken place previously to the said 17th of March, and the settlement in respect of such shares was then proceeding. By the rules of the Stock Exchange, whenever a call is made in respect of any shares previous to a transfer, the vendor is entitled immediately to pay such call without questioning its legality, and although it may not be actually payable for some time thereafter.

1863.
CROSLEY
v.
THE BANK
OF WALES.

Statement.

1863.
CROSBY
v.
THE BANK
OF WALES.

Statement.

Previous to the date of the said second call, some of the defendants the directors had sold shares in the said company at a premium of 2*l.* or more. The result of making such call pending the settlement of the account on the Stock Exchange was not only to secure payment in advance of a large amount in anticipation of the call, but also to depreciate the shares in the market, and enable the directors of the company, and other vendors of shares, to buy them back at a reduced price, or receive a large transfer difference; and the plaintiff charges that in fact some of the defendants the directors who had sold shares at a premium of 2*l.* per share and upwards, actually purchased them back at a discount of 1½ per share.

The plaintiff charges that one of the private banking concerns referred to in the said prospectus was a long-established and valuable business, and, although not specifically named in the said prospectus, the directors had caused it to be extensively known that it was the business of Messrs. Crawshay, Bailey, & Company, of Newport, and it was upon the faith of such representation, and of the representation in the prospectus that the company was formed to take up generally private banking concerns, the negotiations for the purchase of which were nearly complete, that the plaintiff was induced to apply for and become the purchaser of shares in the company.

The plaintiff charges that the aforesaid statement of the said prospectus is altogether untrue, and was so to the knowledge of the defendants at the time it was issued, and that the only negotiation, if any, ever open with the said company for the purchase of private banking concerns was that for the purchase of the business of Messrs. Crawshay, Bailey, & Company, and that such negotiation, if ever opened, had proceeded but a very little way, and ultimately went off, and it could never have been truthfully said that the negotiations for its purchase were nearly complete.

Instead of purchasing private banking concerns, the said company now threaten and intend to waste the assets of the company in the establishment of rival banking concerns in the same towns in which such private banks are established.

Immediately on the issuing of the said prospectus containing the representations aforesaid, and in full belief of the truthfulness of such representations, the shares in the said company became very popular, and were at a considerable premium before the allotment took place, and the plaintiff, and divers other persons, in addition to the shares which they applied to have allotted to them, purchased shares in the company at a premium. Such shares were purchased for the first settling-day which the committee of the Stock Exchange might appoint; and the plaintiff and the other purchasers were bound to complete their purchases on such settling-day, notwithstanding any intervening circumstances. All the defendants hereto well knew of the purchase of such shares at the time the same was made, and some of the said defendants themselves sold shares in the said company at a considerable premium before the allotment had taken place.

On or about the 17th of April, 1863, the allottees of shares in respect of which the second call had not been paid, under the circumstances aforesaid, received a circular letter, signed by the secretary of the said company, announcing that the directors had resolved that the 2*l*. paid on deposit and allotment should be credited as in part payment of the call of 5*l*. per share due on the 30th instant. Some holders of shares in the said company on which the call of 5*l*. had been paid, under the circumstances aforesaid, thereupon applied for a return of 2*l*. per share; but the defendants declined to comply with their request.

At the time the aforesaid second call was made,

1863.
CROSEY
v.
THE BANK
OF WALES.

Statement.

1803.
 CROSKY
 v.
 THE BANK
 OF WALES.
 Statement.

nothing had been paid by any of the subscribers to the said memorandum of Association; nor was any call made on them, or either of them, in respect of the shares which they thereby agreed to take, nor on the forty-five shares in the said company which remained unallotted.

The plaintiff charges that all the defendants have been guilty of such acts of misrepresentation and suppression as entitle him, and the other shareholders in the Company, to a return of the amount paid by them respectively, and to be relieved from all further liability in connection with the said company.

The plaintiff charges that under the circumstances hereinbefore stated, neither the call of 5*l.* nor of 3*l.* per share was legally made, and that the defendants ought to be restrained from enforcing or receiving the same.

The plaintiff charges that many other of the acts and proceedings of the said defendants, in reference to the said company were unauthorised and illegal, and that the defendants William Macnaughtan and John Hackblock, having received the plaintiff's deposit, and having been parties to the aforesaid misrepresentations and suppressions, are liable, notwithstanding their subsequent withdrawal from the direction, to make good the loss occasioned by such misrepresentations and suppressions.

The defendants, or some of them, threatened to enforce the aforesaid second call, unless they shall be restrained from so doing by the order and injunction of this Honourable Court.

The plaintiff prayed as follows:—

“ 1. That it may be declared that the defendants were guilty of misrepresentation and suppression as to entitle the plaintiff, and all the other persons who have paid money on the faith of such misrepresentation, and in ignorance of suppression, to a repayment thereof, and that all the defendants may be declared liable to repay such amounts respectively.

"2. That it may be declared that the aforesaid call of 5*l.* or 3*l.* per share was and is illegal and void, and that the defendants may be restrained from enforcing or receiving the same, or from declaring the forfeiture of any share by reason of the non-payment of such call, and that the defendants the directors may be decreed to repay the amount already received by them on account of such call.

"3. That the defendants may be restrained from opening or establishing any banking business in competition with the private banking concerns referred to in the prospectus, and upon the faith of the purchase of which for the said company, and the carrying on of which by the said company, the plaintiff and others were induced to become shareholders therein.

"4. That the defendants may be decreed to repay the said sum of 6000*l.*, with interest thereon."

1863.
CROCKETT
v.
THE BANK
OF WALES.
Statement.

The Solicitor-General and Mr. *Roxburgh*, for the defendants, opened the demurrer, but were stopped by the Court.

Argument.

Mr. *Malins* and Mr. *W. Morris* for the plaintiff.

It was sufficient to support this bill if the plaintiff were entitled to any relief or discovery. It was quite clear that the payment of the 6000*l.* without a previous investigation of the claim was improper; or, at all events, the 100th article proved that so soon as shares to the amount of 500,000*l.* had been allotted, it should be lawful for the directors to pay 6000*l.* to the said C. Parke; but the bill alleged, and the demurrer admitted, that no such amount had ever been subscribed for. Again: the bill alleged that there had been misrepresentation and suppression of facts, which entitled the plaintiff to relief.

1868.
 CROSBY
 v.
 THE BANK
 OF WALES.
 Judgment.

The VICE-CHANCELLOR:—

This bill is filed by one shareholder, who affects to sue on behalf of himself and all the other shareholders except the defendants. He sues the corporation itself and other individuals named, who are directors, and says that one of them has improperly received a sum of money which belongs to the corporation. The first part of the relief prayed is upon the ground of general misrepresentation and suppression by the defendants, and the plaintiff says that he and all other shareholders who have paid their money upon such misrepresentation and such suppression are entitled to the repayment of the money.

But the plaintiff has no right to maintain a suit for such a purpose. In *Jones v. Garcia del Rio* (a), Lord Eldon said that a case of fraud alleged under such circumstances amounted to a distinct and separate ground of complaint in equity for each shareholder. At page 301 Lord Eldon said, "that the plaintiffs in that case, if they had any demand at all, had each a demand at law, and each a several demand in equity; that they could not file a bill on behalf of themselves and the other holders of scrip; and, as they were unable to do that, they could not, having three distinct demands, file one bill." The first part of the relief prayed therefore, fell clearly within the principle of *Jones v. Garcia del Rio*. Lord Eldon said, moreover, that in a case of this kind each party has a separate demand in equity, and that no one is entitled, in a general way, to appear for himself and to represent the other shareholders, or to come forward and complain in that character of an injury which is a separate injury.

The next part of the relief prayed is in respect of an alleged illegal demand in the shape of a call of 3*l.* or 5*l.* This is a question of construction as to what a call is, and

(a) T. & Russ. 297.

here it is as plain as language can show that by the memorandum of association, which is the contract between the parties, and the prospectus, there is a difference made between a payment on deposit, a payment on allotment, and a call. This is pointedly noticed by the fifteenth allegation in the bill. A call is a thing which cannot be made until shares have been allotted. If the bill had not pointed out this difference, the objection taken would be fatal to this part of the plaintiff's case; and the bill could not be sustained upon that ground even if it were not covered by the decision in *Jones v. Garcia del Rio*.

The next ground is more extraordinary than the others. The bill seeks to restrain the defendants from opening banking establishments in competition with the private banking concerns referred to in the prospectus. But this part of the case is completely contradicted by the language of the prospectus, for the whole purpose of the formation of this corporation—a large banking concern—was to establish banking establishments in various parts of Wales. To say that that purpose is not to be carried into effect because the bank will come into competition with private banks in Wales, is something like nonsense. It is said that the directors represented to various parties that what was meant by establishing banks in Wales, although it was not set forth in the prospectus, was the purchase of the establishment of Crawshay, Bailey, & Co. in some particular town. There is no warrant for that, and this part of the case is so wholly inconsistent with the prospectus, and with anything that is feasible in the other statements of the bill, that I have been unable to follow the arguments pressed by the counsel for the plaintiff. Mr. Malins took his ground upon the alleged wrongful payment of the 6000*l*. The bill prays that this sum may be ordered to be repaid, but it does not say to whom it should be repaid. The memorandum of association in express terms authorises

1863.
CROSBY
v.
THE BANK
OF WALES.
Judgment.

1868.
 CROSKY
 v.
 THE BANK
 OF WALES.
Judgment.

the directors, without further warrant or authority, when a sufficient allotment of shares has been made, to pay a gross sum of 6000*l.* to Charles Parke, his executors, administrators, and assigns. Now, as to the allotment of shares, the 12th paragraph of the bill complains that the directors precipitately on the 3rd February allotted the shares, but the statement is very confused when read in connection with other statements that the directors did not allot 5000 shares, but only 4955. But, in reference to the allegations in the bill, that the directors allotted forty-five shares in the manner mentioned in the 16th paragraph, in order to give an appearance of legality to their proceedings, I can find nothing to justify the statements of the plaintiff, nor can I say that he or any other person is entitled to any relief in respect of the 6000*l.* The plaintiff endeavours to make out a case that the 6000*l.* was wrongly paid, not because paid too soon, but because no bill of costs had ever been delivered. The direction in the memorandum of association is that this 6000*l.* shall be paid by the directors, without any further power or authority from the shareholders, as a gross sum. Upon that ground of complaint the bill also fails.

What remains of the bill consists of statements imputing misrepresentation and fraud, but there is no distinct statement to show in what such fraud and misrepresentation consisted, which, when charged, ought to be set forth in particular allegations. The demurrer must be allowed with costs.

His Honour refused leave to amend.

THE ATTORNEY-GENERAL v. THE
TEWKESBURY AND MALVERN RAILWAY
COMPANY.

1863.

March 19.

THIS was an injunction filed on the relation of Archdeacon Timbrill, one of the trustees under the 7 Geo. 4, c. III. being an Act for maintaining certain roads into and from the town of Tewkesbury towards Gloucester and Worcester, and prayed that the company might be restrained from erecting or building any bridge over the road mentioned in the pleadings so as to leave a less width than forty-five feet, or except in accordance with the plans and sections so deposited as aforesaid. The bill stated the constitution of the turnpike trust, and that, by virtue of the powers and authorities in that behalf contained in the said Acts of Parliament, the land forming the north-western side of the turnpike road hereinafter mentioned for a considerable distance along its course, and including the whole site of the excavation made by the defendants, as hereinafter stated, was in the year 1833 purchased for and appropriated to, the purpose of widening the said turnpike road, and thereby improving the entrance to the town of Tewkesbury into which it leads, and the said land is now vested in the said trustees so appointed as aforesaid.

The bill then alleged that by the Tewkesbury and Malvern Act, 1860, incorporating the Lands Clauses and Railways Clauses Consolidation Acts, the company were empowered to make the line of railway. That by section 28 it was enacted, "that, subject to the powers and provisions in that Act and the Acts incorporated therewith, the company might make and maintain the railway and works on the line and upon the lands de-

Where the plans and sections for the construction of a bridge over a public road described the breadth of the proposed bridge as forty-five feet, the Court restrained the company from constructing the said bridge except in accordance with the plans and sections so deposited.

The 13th section of the Railway Clauses Act, which provides "that where in any place it is intended to carry the railway on an arch or arches, or by a viaduct, as marked on the plans and sections, the same shall be made accordingly," means, according to such plans and sections.

1863.
 THE
 ATTORNEY-
 GENERAL
 v.
 THE
 TEWKES-
 BURY AND
 MALVERN
 RAILWAY
 COMPANY.

—
Statement.

lineated on the plans and described in the books of reference so deposited as aforesaid, and according to the levels defined on the said sections, and might enter upon, take, and use such of the said lands as should be necessary for such purpose."

"Under the powers contained in that behalf in the said 'Tewkesbury and Malvern Railway Act, 1860,' and in the Acts therein incorporated as aforesaid, the defendants commenced and have for some time past been proceeding with the construction of their said railway, and in the course of such construction they intend to carry their said railway by a bridge over and across a turnpike road leading from the town of Tewkesbury towards Bredon and Pershore, at a point within the parish and borough of Tewkesbury.

"The said turnpike road consists of a carriage road and a raised footpath, and at the point at which it is intended to cross it by the said bridge, at the centre line of the said bridge, the said road is of the width of forty-three feet, or thereabouts, the carriage road being of the width of thirty-seven feet, or thereabouts, and the footpath of six feet or thereabouts.

"The plans and sections deposited by the defendants previously to their obtaining their said Act of Parliament, and which plans and sections are therein referred to, show that the said turnpike road at the point in question is to be crossed by the defendants' said railway upon one arch of forty-five feet span, such span being the necessary span for the purpose of preserving undiminished the width of the said turnpike road.

"In the month of November last, Mr. Anstie, one of the assistant-engineers of the said company, and on behalf of the said company, attended a meeting of the said trustees, and requested from them permission to narrow the span of the proposed bridge to thirty-five feet, and to erect one of the piers for the support thereof on

the north-west side of and upon the said turnpike road, and to encroach upon the said turnpike road for that purpose, but the said trustees after considering the matter unanimously refused to give the desired permission.

“On the 9th day of January last, or thereabouts, and without any further communication with the trustees, the engineers or contractors of the said company commenced to break up the said turnpike road, and to make excavations in the said road for the foundation of the said pier, and on the 10th day of January, the said Mr. Anstie, in answer to a remonstrance made to him on the subject, stated that the works were being done by his directions, under the orders of Mr. Hemans, the chief engineer of the said company, and that the effect of the works when completed would be to leave a clear width of thirty-five feet for the carriage road and foot-path, which width was all that Mr. Hemans considered necessary, and all that the public were entitled to.

“On the 12th day of January, 1863, Messrs. C. W. Moore and L. W. Lewis, who are the clerks of the said trustees, and on their behalf, wrote and caused to be on the same day served on the said Mr. Anstie, and also on the sub-contractor for the said works, and on the following day to be served on the Secretary of the defendants' said company, a notice in writing, which was as follows (that is to say):—

‘To the Tewkesbury and Malvern Railway Company, and to their engineers and contractors, and to all other persons concerned.

Whereas by the Tewkesbury and Malvern Railway Act, 1860, your said company are authorized to construct a line of railway and works in accordance with certain deposited plans and sections in the said Act referred to, and which plans and sections (as also the Parliamentary notice given by

1863.
THE
ATTORNEY-
GENERAL
v.
THE
TEWKES-
BURY AND
MALVERN
RAILWAY
COMPANY.
—
Statement.

1863.

THE
ATTORNEY-
GENERAL
v.
THE
TEWKES-
BURY AND
MALVERN
RAILWAY
COMPANY.

Statement.

the promoters of the said railway to the after-mentioned trustees) show that it was intended to carry the said railway over the turnpike road, leading from the town of Tewkesbury towards Bredon, by a bridge, to consist of one arch of forty-five feet span, and sixteen feet high. And whereas, at a meeting of the trustees of the said turnpike road, held on the 14th day of November last, you, or some of you, by Mr. John Anstie, one of the engineers of the said company, applied to said trustees for permission to reduce the span of the said intended arch from forty-five to thirty-five feet, and for that purpose to build the north-western pier of the said intended bridge upon part of the said turnpike road, but which permission was unanimously refused by the said trustees. And whereas, in spite of such refusal, you, or some of you, are illegally proceeding to erect the said bridge of a less span than is specified on the said plans and sections, and for that purpose have already encroached on the said turnpike road, and made an excavation therein for the foundations of the said intended pier, and erected a line of posts and rails on the said road, and by such encroachments, have reduced the width of the said turnpike road available for the passage of carriages to thirty feet, or thereabout. Now, therefore, we the undersigned Charles William Moore and Lauriston Winterbotham Lewis, as the clerks to the said trustees, and on their behalf and by their authority, do hereby give you notice and require you and every of you forthwith to desist from the illegal prosecution of the said works, and not in any manner to deviate from the said plans and sections so as to encroach upon or interfere with the free use and enjoyment of the said turnpike

road, and also forthwith to remove the said posts and rails, and to fill up the said excavation, and effectually to restore the said turnpike road to its former state and condition, except in so far (if at all) as such road may be necessarily encroached upon by a bridge of the character and span shown on the said plans and sections, and also to pay and satisfy to the said trustees all costs, charges, and expenses incurred or sustained by reason or in consequence of such your illegal proceedings. And we give you and every of you further notice, that unless you shall forthwith comply with the foregoing requirements, the said trustees will take such proceedings, by action at law, a bill in Chancery, indictment, or otherwise, against you and every or any of you, as counsel may advise, for preventing the illegal prosecution of the said works or procuring the removal thereof, if persisted in, and for obtaining compensation for any loss or injury thereby occasioned, and for punishing all persons offending in the premises. Dated the 12th day of January, 1863.

‘(Signed) CHARLES W. MOORE.
LAURISTON W. LEWIS.’

1863.
THE
ATTORNEY-
GENERAL
v.
THE
TEWKES-
BURY AND
MALVERN
RAILWAY
COMPANY.
—
Statement.

“Shortly after the said notice was sent to the defendants, their engineer proposed a meeting with some of the trustees, which meeting took place on the 19th day of January, 1868, and was attended by Mr. Holland, the company’s solicitor, and Mr. Hemans, their chief engineer, and several other persons engaged in the construction of the said railway. The said interview, however, ended by the said Mr. Hemans insisting on the right of the defendants to proceed as they had begun, which he intimated they would do, and leave the trustees to apply for an injunction if they chose.”

The trustees thereupon held a meeting, at which it

1863.
THE
ATTORNEY-
GENERAL
v.
THE
TEWKES-
BURY AND
MALVERN
RAILWAY
COMPANY.

Statement.

was unanimously agreed to apply for an injunction to the Court of Chancery.

The bill contained the following allegations, which were proved by affidavit:—

“14. The excavation in the said turnpike road, made by the defendants, for the foundation of the pier so proposed to be made by them as aforesaid, is fifty-eight feet long, and varies in width from four to seven feet, and at its point of greatest encroachment extends into the said road so as to diminish the width thereof by the space of eleven feet or thereabouts; and outside of the said excavation, and further into and upon the said road, the defendants have carried a line of posts and rails, which further diminishes the width of the said road, and reduces the width thereof available to the public for the passage of carriages to twenty-three feet or thereabouts.

“15. The result of the defendants' said works, if carried on in the manner proposed and commenced by them, will be to effect a permanent encroachment on the said road to the extent of ten feet, or thereabouts, and a permanent reduction of the width available for the passage of carriages to twenty-nine feet, or thereabouts.

“16. The defendants allege and insist that they are at liberty, under the provisions of ‘The Tewkesbury and Malvern Railway Act, 1860,’ as aforesaid, to make the said bridge of a span of only thirty-five feet, the effect of which will be to allow permanently thirty-five feet only for the combined width both of the carriage and footway.

“17. The said turnpike road is much used by the public, and the point of such proposed crossing, as aforesaid, is at or close to the entrance of the town of Tewkesbury, and the present condition of the said road arising from such excavation, posts, and rails, as aforesaid, is, and the permanent abridgment of the width of the said road by building the said bridge as proposed by the defendants contrary to the plans and sections so deposited by

them as aforesaid, will, if permitted, be an inconvenience and injury to the public.

“ 18. The said trustees of the said road, and the plaintiff who represents them in this suit, have also an individual interest and duty to maintain the said road in good repair, and of undiminished width and accommodation, and by the wrongful acts of the defendants herein stated the said trustees have sustained considerable damage and expense, by reason of the necessity of employing surveyors, and otherwise ascertaining and resisting the encroachments of the defendants.

“ 19. The informant and plaintiff are advised and submit that the proceedings of the defendants in excavating and obstructing the said road in manner aforesaid are unauthorized and illegal, but the defendants refuse to alter their course of procedure, and threaten and intend to proceed with their said bridge and works in the manner in which the same have been commenced, and have recently signified their intention to apply to the Board of Trade to decide upon the question at issue.

“ 21. The defendants have lately set out and been building the other or south-eastern pier of the said bridge, and, notwithstanding they were cautioned on the subject by the surveyor of the said trustees, the defendants have persisted in building the same, so that, as the said trustees have recently discovered, the brickwork of the last, mentioned pier encroaches into the footpath of the said turnpike road to the extent of nine inches or thereabouts, and thereby the width of the said footpath is reduced to five feet, one inch, or thereabouts, and a further diminution over and above the diminution resulting from the matters hereinbefore stated is made in the total width of the said road.”

Mr. Malins and *Mr. Millar* now moved for an injunction in the terms of the prayer of the bill.

1863.

THE
ATTORNEY-
GENERAL
v.
THE
TEWKES-
BURY AND
MALVERN
RAILWAY
COMPANY.

Statement.

Argument.

1863.
 THE
 ATTORNEY-
 GENERAL
 v.
 THE
 TEWKES-
 BURY AND
 MALVERN
 RAILWAY
 COMPANY.

—
Argument.

The railway company are bound by the plans and sections deposited, which was the only guide that Parliament or the public could have as to the proposed works. If a railway company were at liberty to depart from the plans, there would be no certainty as to their powers. If they could make a road ten feet less than that designated by the plan, why not twenty feet less? The argument did not apply to roads and bridges only, but to all the works which a company were authorized to do. To allow them, therefore, to vary from their plans was to give them powers beyond those given by the Legislature.

But, secondly, it was submitted that the language of the 13th section of the Railway Clauses Act was express: the words were, "that where it is intended to carry the railway by a viaduct, as marked on the plans and sections, the same shall be made accordingly." That is, according to such plans and sections.

It was submitted, therefore, that the plaintiff was entitled to the injunction.

Mr. *Bacon* and Mr. *Dryden* for the company.—The word "accordingly" meant, "in pursuance of the power conferred," and was not intended to prescribe any precise mode of exercising such power. There was a general enactment applicable to the construction of viaducts over turnpike roads in the 49th section of the Railway Clauses Act, with which this 13th section did not intend to interfere. That was, that every viaduct over a turnpike road should leave a space of thirty-five feet: that is what the company proposed to do here. No special case had been made on the passing of this Act for a greater span than usual, nor indeed was any such now made by the bill: the Legislature never could have intended such an unmeaning thing, as, without any reason being assigned for it, to override the general rule laid down in the 49th section. It was submitted that the motion must be refused.

The VICE-CHANCELLOR:—

In construing the Act of Parliament, the deposited plans and sections to which the Act refers must also be looked to. The railway company, according to their deposited plans and sections, describe the breadth of the bridge to be forty-five feet. The 13th section of the Railway Clauses Act says, "That where in any place it is intended to carry the railway on an arch or arches, or by a viaduct, as marked on the plans and sections, the same shall be made *accordingly*." The word "*accordingly*" seems to me to mean, "*according to the plans and sections*," and I cannot say, upon the construction of those words, that, if the plans and sections describe a bridge as being of the width of forty-five feet, the work is made according to those plans and sections if it is made only thirty-five feet in breadth. If I had any doubt about that, I think it would be removed by the 14th section, which immediately follows, which gives power to the company in certain cases to alter or deviate from what is described in the plans and sections. The 14th section says: "It shall not be lawful for the company to deviate from or alter the gradients, curves, tunnels, or other engineering works described in the plans and sections, except within certain limits therein specified." It seems impossible to say that a bridge is not an engineering work as described in the plans and sections, and, unless under this power to alter what is described in the plans and sections a power is found to alter the dimensions from forty-five feet to thirty-five feet, there is no power to make an alteration in the mode of construction that is pointed out in the plans and sections at all. It is said, however, that the 49th section applies directly to this case, because the 49th section says what shall be the breadth of every bridge to be erected for carrying a railway over any road, and there it is provided that the breadth shall in no case be less than thirty-five feet. That seems to be very plain language.

1863.
THE
ATTORNEY-
GENERAL
v.
THE
TEWKES-
BURY AND
MALVERN
RAILWAY
COMPANY.
Judgment.

1868.
THE
ATTORNEY-
GENERAL
v.
THE
TEWKES-
BURY AND
MALVERN
RAILWAY
COMPANY.
Judgment.

If the deposited plans and sections had said that the breadth should be thirty-five feet, that would be within the provisions of the Act of Parliament; but when the deposited plans and sections state that it shall be more than thirty-five feet—that is, that it should be forty-five feet—it has been gravely argued that saying that “it shall not be less than thirty-five feet” means that “it shall not be more.” The information is filed by the Attorney-General in a matter that concerns the public. The proper breadth and the proper dimensions, with regard to a public road, are matters of public concern; and I think the railway company, when they deposited their plans and sections, showed a very just regard for the public interest when they described that the breadth would be forty-five feet: and they have no power, in my opinion, according to the construction of the Act of Parliament, to deviate from that. I must, therefore, by the injunction of this Court, restrain them from doing so. The injunction must be in the terms of the prayer of the bill.

1868.

March 17.

WILLIAMS v. COOKE.

THIS suit was instituted to administer the estate of Richard Davies, the testator in the cause, who prior to his decease deposited with his niece E. A. Davies, now Mrs. Cooke, the title deeds of certain real property at Shrewsbury, in order to secure a sum of 442*l.* due by him to his said niece.

Where a married woman, who prior to her marriage was entitled under a will to a debt payable after the death of her sister, secured on land by the deposit of title deeds, by deed acknowledged joined her husband in assigning her share and interest in the said debt, and the said real security, in order to secure monies due by her husband—*Held*, in a suit to administer the testator's estate, that she was not entitled to a settlement out of the proceeds of the real estate.

The testator, by his will, dated the 19th April, 1844, devised the same messuage and premises, and all other his real estate whatsoever and wheresoever, and all his personal estate, to his sister Mary Eleanor Davies (whom he also appointed his sole executrix) for life, “freed and discharged during her life from the payment of the debt or sum of 442*l.* then due and owing by him to his niece Elizabeth Abigail Davies,” and interest at 4½ per cent., and also freed and discharged from another debt of 105*l.* 10*s.* 6*d.*, then due to his said sister, and interest, but subject to the payment of all his other debts and funeral and testamentary expenses; it being his will that she should enjoy the rents and income of his real and personal estate without any deduction in respect of the said two debts; and from and after the death of his sister he gave and devised his said messuage or dwelling-house to Peter Beck and the said Elizabeth Abigail Davies, their heirs and assigns, upon trust, by sale or mortgage of the premises or otherwise, to raise such sums as they should think necessary to pay and discharge the said debts and interest, and also the further sum of 100*l.*, which he bequeathed to his said niece, and subject thereto upon trust for the said Elizabeth Abigail Davies and five other persons in equal shares, as tenants in com-

1863.
WILLIAMS
v.
COOKE.
—
Statement.

mon; with remainder, as to two of the shares, in the event of the devisees dying under twenty-one without issue, to his said niece Elizabeth Abigail Davies, her heirs and assigns. Testator also bequeathed all his personal estate, after the death of his sister, to his said niece Elizabeth Abigail Davies. It was also provided that the persons to whom the said two first-mentioned debts were due should not, during the lifetime of his sister, under penalty of forfeiting all benefit under the will, enforce payment thereof until after his sister's death, and that no interest should be paid thereon during the life of his said sister; also every gift to a female should be for her sole and separate use.

The testator died in September, 1847. E. A. Davies, previously to his death, intermarried with Joseph Cooke. The usual administration decree was made to administer the testator's estate.

By an indenture, dated the 14th March, 1851, made between Mr. and Mrs. Cooke, of the first part; and Messrs. Rocke & Co., bankers, of Shrewsbury, of the second part (which deed was executed, but not acknowledged by Mrs. Cooke), Mr. and Mrs. Cooke assigned two policies of assurance, and the said debts of 442*l.* and 105*l.* 10*s.* 6*d.* and interest, and the said legacy of 100*l.*, to the Messrs. Rocke to secure advances by them, or the overdrawn balance of Mr. Cooke's current account to the extent of 1000*l.*; and by another indenture indorsed on the former, dated the 9th February, 1856, and made between Joseph Cooke alone of the first part, and the Messrs. Rocke of the second part, the security was extended to the sum of 2000*l.*

By another deed, dated the 13th February, 1856, and made between Mrs. Cooke of the first part, Joseph Cooke of the second part, and the Messrs. Rocke of the third part (which deed was acknowledged by Mrs. Cook), after reciting that it had been intended that the

shares of Mrs. Cooke, under the will should be included in the above-mentioned securities, but an appointment thereof, and also her concurrence in the secondly mentioned deed, had been omitted by mistake; all the shares and interest of Mrs. Cooke in the said dwelling-house and real estate, and generally under the will, were conveyed to the Messrs. Roche upon the trusts of the preceding indentures.

Mary Eleanor Davies, the testator's sister, died on the 4th January, 1859.

The real estate consisted of the property at Shrewsbury, which was sold for 1205*l.*, and paid into court. There was no personal estate.

The chief clerk certified the only incumbrance affecting the real estate was the debt of 442*l.* 10*s.* due to Messrs. Roche, "as assignees of a debt which was secured by the testator to the said Elizabeth A. Cooke before her marriage by a deposit of deeds relating to the said testator's real estate," with interest, making together 486*l.* 14*s.* 9*d.* "The said deeds had been handed over to the defendants, Messrs. Roche, at the date of the indenture, dated the 14th of March, 1841."

Mr. and Mrs. Cooke took out a summons to vary the chief clerk's certificate, which was adjourned into court.

Mr. *Malins* and Mr. *Caldecott* now appeared on the adjourned summons, and moved to vary the certificate. They contended that the testator's will had made the payment of this debt a reversionary interest, and it was secured on land; but, if so, it was clear a *chose in action* of a married woman could not be assigned, and therefore did not pass under either the deed of 1851 or of 1856. The debt was charged upon real estate; but the interest of the married woman therein was not such as she could have disposed of before the Fines and Recoveries Act, by means of a fine to a stranger, though she might have

1863.
WILLIAMS
v.
COOKE.
—
Statement.

Argument.
—

1863.
 WILLIAMS
 v.
 COOKE.
 —
 Argument.

released it by fine to a person having an estate in the land. If so, she could not now pass it by deed acknowledged, and was entitled to a settlement out of it. In *Hobby v. Collins* (a), in an almost similar case it was held doubtful whether a married woman could affect her reversionary interest in the money charged on land.

Mr. *Craig* and Mr. *Kenyon*, for Messrs. *Rocke*, the bankers, contended that all Mrs. *Cooke's* interest passed by the deed of 1856; secondly, Mrs. *Cooke* had elected to give up her rights as a creditor and take the interest in the land given her by the will. Hence the interest of Mrs. *Cooke* in the land was a security in the hands of the bankers for their debt.

[*May v. Roper* (b), *Briggs v. Chamberlain* (c), *Barrow v. Barrow* (d), *Goodrick v. Shotbolt* (e), *Ex parte Baine* (f), and *Forbes v. Adams* (g) were also cited.]

Mr. *Shebbeare* and Mr. *Goren* appeared for other parties.

Judgment.

The VICE-CHANCELLOR:—

Where a debt is secured by deposit of title deeds, the real estate being the subject of an equitable mortgage, the owner of the debt has an interest in the real estate. By the marriage, the debt, together with the title deeds which were deposited for the purpose of securing the debt, became the property of the husband. The wife concurred in assigning the debt and title deeds by way of security to the bankers, who are claimants of the fund in this case. The Court ordered a sale of the estate, and some of the parties whose concurrence in the sale was

(a) 4 De G. & S. 289.

(b) 4 Sim. 360.

(c) 11 Hare, 69.

(d) 4 K. & J. 409.

(e) Prec. in Chan. 333.

(f) 2 M. D. & De G. 492.

(g) 9 Sim. 462.

necessary were these bankers, who were the holders of the title deeds which conveyed an interest in the land for the purpose of securing the debt. They now ask for payment of the debt, not out of the personal estate, but out of the proceeds of the real estate, in which they have an interest by the deposit of the title deeds. Upon this the married woman appears and claims to be entitled to an equity for a settlement, just as if this fund were personal estate and had been ordered to be paid to the husband's assignees in her right. That is not the course of the Court. This married woman acknowledged the deed in accordance with the provisions of the Fines and Recoveries Act, and by that proceeding she concurred in assigning her estate. I think she is not entitled to a settlement, and that the chief clerk was right. The summons must be dismissed with costs.

1883.
WILLIAMS
v.
COOKE.
—
Judgment.

1863.

Jan. 30, 31.

KEMP v. BURN.

Where the trustees under a will refused to furnish the solicitor of the residuary legatee with an account, though they offered to permit the plaintiff herself or a professional accountant to inspect the accounts, the Court ordered them to pay the costs of a suit to administer the testator's estate.

THE question^s was as to the costs of the suit. The bill was filed by Mrs. Kemp by her husband, her next friend, and it prayed that the estate of John Weldall might be administered under the direction of the Court.

The defendants were the surviving trustees and executors under the will.

Some time prior to 1855 the plaintiff's solicitor, a Mr. Simpson, on behalf of the plaintiff required from the defendant Burn an account of the testator's estate, and intimated that unless such accounts were received proceedings would be taken against the defendants, of which they would be asked to pay the costs. The defendant Burn refused to give any account to Simpson, but stated that he had offered to allow Mrs. Kemp to inspect the accounts for herself.

In the beginning of 1862 Mr. Simpson applied to the defendant's solicitor and to the defendant Sargisson, the co-trustee, for an account, but no account was rendered. The plaintiff shortly afterwards filed this bill, praying that an account might be taken, and that the plaintiff might be let into the possession of the real estate devised to Mrs. Burn, and that the defendants might pay the costs of the suit.

In their answer the defendants alleged that that they offered to allow the plaintiffs, or any accountant whom they would name, to inspect and take copies of the accounts. They alleged that the plaintiffs had to their knowledge borrowed money from Simpson which they were spending in an extravagant way; and that they believed Simpson's sole object in requiring the account was to see whether he could advance further sums on the security of the property comprised in the will, and that it

was on this ground alone that they refused to give Simpson the accounts he sought.

Mr. *Malins* and Mr. *Nalder* for the plaintiffs.—The necessity for this bill was the refusal of the defendants to render those accounts which the plaintiffs were clearly entitled to have rendered, either to themselves or to their agents: *Anon.*(a), *Collyer v. Dudley*(b), *Springett v. Dashwood*(c), *Pearse v. Green*(d). It was submitted, therefore, that the defendants ought to pay the costs of the suit.

Mr. *Osborne Morgan* for the trustees.—The Court will not make a trustee pay costs unless for corrupt conduct or improper motives: *Taylor v. Glanville*(e), *Noble v. Meymott*(f). A mere refusal to render accounts is no ground for visiting a trustee with costs: *White v. Jackson*(g). This was not a refusal to render any account, but simply a refusal to render accounts to a person who the defendants honestly believed wanted to make an improper use of them. Moreover, the bill was not confined to the prayer for an account. The object of the bill was to induce the Court to direct that the plaintiffs should be let into possession of the estate.

The VICE-CHANCELLOR:—

In a case like the present, where an account is demanded of trustees and executors of a will by a residuary legatee, there seems to me no doubt what the duty of the executors is. Their duty is to keep proper accounts, and to have them always ready when called upon to render

1863.

KEMP
v.
BURN.

Argument.

Judgment.

(a) 4 Mad. 273.

(b) T. & R. 421.

(c) 2 Giff. 521.

(d) 1 J. & W. 135.

(e) 3 Mad. 176.

(f) 14 Beav. 471, 480.

(g) 15 Beav. 191.

1863.

KEMP

v.

BURN.*Judgment.*

them. If it be a part of their duty to render accounts when called upon, that duty has clearly not been performed in the present case.

It appears that in 1855 the solicitor of the plaintiffs applied to the defendant Burn, who seems to have been the acting executor and trustee, to render an account; that request was not complied with, and, instead of that being done, what the defendant Burn insists upon is, that an account was duly kept, and was always ready for inspection; and that he had offered to allow the plaintiffs themselves, or any other person, or any accountant on their behalf, as is stated in their answer, to inspect these accounts. The defendants also say they offered to allow the plaintiffs to take copies of them. Although the answer broadly and distinctly says the offer was to allow any other person, or an accountant named by the plaintiffs to inspect the accounts, the fact seems to be that the person named by the plaintiffs was objected to by the defendant Burn, the acting trustee and executor.

There must be some strong reason to justify any executor and trustee in refusing to allow the solicitor of a residuary legatee to interfere in the matter of the accounts. The reason assigned here is some benevolent or good feeling entertained towards the plaintiff which justified the executors and trustees in this case; for the defendant Burn says he had reason to know that the solicitor who made the application on behalf of the plaintiffs made it for no purpose really useful to the plaintiffs, but to serve a purpose of his own; that he had advanced money to the plaintiffs, and the view which the executor and trustee took of the plaintiff's interest induced him to think it would not be for the interest of the plaintiff that he should render the accounts or allow an inspection of them. There is nothing to justify this view of his duty on the part of this gentleman.

It has been said, but not proved, that this solicitor had advanced money to the plaintiffs. That may have been

the most kind and proper thing to do; at any rate, I cannot say it was anything improper, or which would justify the defendant Burn in not rendering an account. Upon the whole the case resolves itself into this — that the executors and trustees did not render an account when called upon to do so in the year 1855 by the plaintiffs' solicitor; that from that year down to 1862 the plaintiffs remained without an account being rendered, and without any other offer being made than an offer to them, or any other person, or an accountant, to inspect and take copies. I cannot consider that that is sufficient. The bill puts the case somewhat too broadly, because the eleventh paragraph, which raises the question, is as follows:—
 “The plaintiffs have frequently since the death of the said testator applied to and requested the defendants to furnish the plaintiffs with an account of the personal estate of the testator, and of the rents and profits of his real estate, and of the application thereof. The defendants, however, always have refused, and still refuse to give the plaintiffs any account of the real and personal estate of the testator, or of their dealings therewith; and the plaintiffs are compelled by the conduct of the defendants to resort to this Honourable Court to obtain such account.” Now, it can hardly be said that there was a refusal to give an account; but there was an offer to allow an inspection of the accounts. It is a hard thing to be obliged to punish an executor and trustee for any mistake he may have made in doing his duty honestly; but, with every consideration towards honest executors and trustees, if they fail in so important a matter as rendering an account to the person who is entitled to it, and if that make it necessary for the beneficiaries to file a bill, it seems that the person failing in such duty ought to be made to pay the costs of the suit up to the decree.

1863.
 KEMP
 v.
 BURN.
 —
Judgment.

A decree was ultimately made against both defendants, with costs up to the hearing.

1863.

April 22.

WRIGLEY v. THE LANCASHIRE AND
YORKSHIRE RAILWAY COMPANY.

Where the plans deposited by a railway company delineated a field, showing the line, the limits of deviation, and the boundaries on one side of those limits, but leaving the boundaries on the other side undefined, the Court restrained the company from taking the land beyond the limits of deviation on the undefined side, though the name of the owner of the whole field was described in the book of reference.

THE plaintiff, under a lease dated the 10th July, 1861, became the lessee of certain lands, and also of a close of land called "Laith Ing," at Netherton, in the parish of Almondbury, Yorkshire, for the term of twenty-one years. In the lease of the other lands the lessors reserved power to reserve the said lands for the purpose of building or making streets, but, in order to preserve the view to the plaintiff of Melsham Valley, Laith Ing was not included in such power. When the defendant's railway was projected, and the usual notices being served, the plaintiff dissented unless "arrangements satisfactory to him were made with regard to the station at Netherton. The company thereupon promised that nothing should be done without consulting the plaintiff. The bill stated that, about the end of the year 1852, the plaintiff had an interview with a Mr. Perring, one of the company's engineers, and intimated he should oppose the approach road being made on the southern side of the farm buildings across the land comprised in the lease. Mr. Perring thereupon sent to the plaintiff a tracing purporting to show, by the colour *red*, what part of the plaintiff's land at Netherton was required for the said branch railway. The land therein coloured red was therein stated as containing 710 square yards, and was described as approach road to station. The land coloured red was part of the close called Laith Ing. The bill alleged that if the road were made as thus proposed the plaintiff's object in taking the lease would be entirely defeated. The plaintiff, therefore, and with a view to

arrange the dispute in an amicable way, wrote to the company stating his objection, but heard nothing further from the company until he received the following notice:—

1863.
WRIGLEY
v.
THE
LANCASHIRE
AND
YORKSHIRE
RAILWAY
COMPANY.
—
Statement.

“ Lancashire and Yorkshire Railway, Melsham Branch.

“ Notice of intention to take lands.

“ You are hereby required to take notice, that by virtue of the several Acts of Parliament relating to the Lancashire and Yorkshire Railway Acts, viz., Lands Clauses Consolidation Acts, &c., the said Lancashire and Yorkshire Railway Company requires to take and purchase, for the purposes of the railway and works authorized by the said last mentioned Act, all that piece of land and the buildings (if any) thereon, and other the tenements and hereditaments described and delineated in the schedule and plan hereunto annexed, and in the said plan coloured red.

“ And the company demands, and you are hereby required to deliver at the office of Messrs. T. A. and J. Grundy, Manchester, a statement in writing of the particulars of your estate and interest respectively in the said land, hereditaments, and premises, and of the claims made by you or any or either of you in respect thereof.

“ And you are hereby further required to take notice, that the said company are willing to treat for the purchase of the land, hereditaments, and premises so required and intended to be purchased and taken as aforesaid, and as to the compensation to be made to all parties for the damage that may be sustained by reason of the execution of the said railways and works.

“ And you are also required to take notice, that the company, intends immediately to use the said lands, hereditaments, and premises for the purpose of the said railway and works, and that if you or any of you shall be

1863.
 WRIGLEY
 v.
 THE
 LANCASHIRE
 AND
 YORKSHIRE
 RAILWAY
 COMPANY.

Statement.

in possession of the same, or any part thereof, having no greater interest therein than as tenant for a year, or from year to year, the company hereby requires you respectively to give up immediate possession to them of the said lands, hereditaments, and premises.

“And you are further to take notice, that if any of you claim compensation in respect of any unexpired term or interest under any lease or grant of any land, hereditaments, and premises, the company demands and requires you to produce [the lease or grant in respect of which such claim is made, or the best evidence thereof in your power, to the said company, at the office of their said solicitors, and if any such lease or grant or the best evidence thereof be not produced within twenty-one days from the service hereof, the party so claiming compensation will be considered as a tenant holding only from year to year, and be entitled to compensation accordingly.

“And you are hereby further required to take notice, that if for twenty-one days after the service hereof you shall fail to state the particulars of your claims respectively, or in respect of any of the lands, hereditaments, and premises required and intended to be purchased and taken as aforesaid, or to treat with the said company in respect thereof, or if you or any or either of you and the company shall not agree as to the amount of compensation to be paid by the company for any interest belonging to you, or any or either of you, in any such lands, hereditaments and premises, or which you or any or either of you may be by any of the said Acts of Parliament enabled to sell and convey or release, or for any damage that may be sustained by you respectively by reason of the execution of the said railway and works, the company will enforce the provisions of ‘The Lands Clauses Consolidation Act, 1845,’ for settling cases of disputed compensation, and will take such measures in the premises as by the said Acts of Parliament, or any

of them, they are empowered to do with a view to obtaining immediate possession of the said lands, hereditaments, and premises, and forthwith proceeding with the execution of the said railways and works.

" And you are hereby further required to take notice, that the present notice is given without prejudice to the right of the said company to take by virtue of the several Acts of Parliament hereinbefore referred to, or any of them, any further or other portion of any lands, buildings, tenements, or hereditaments belonging to you, or any or either of you, or in which you or any or either of you are interested, which may be required for the purposes of the said several Acts of Parliament, or any of them.

" Dated the 9th day of February, 1863.

" WILLIAM S. LAWN,

" Secretary to the said company.

" To W. Battye, G. Armitage, J. Armitage, and W. Brooke, Esquires, trustees of Beaumont's Charity, and J. Wrigley, Esquire, and all other parties claiming to be entitled to, or authorized to receive compensation for the said lands, hereditaments, and premises described and delineated in the schedule and plan hereunto annexed, or any estate, share, or interest, or charge in or upon the same, or any part thereof, or for any injury or damage by the taking of the said hereditaments by the Lancashire and Yorkshire Railway Company.

" The Schedule referred to in the Foregoing Notice.

" All that piece or parcel of land and hereditaments delineated in the plan hereunto annexed and therein coloured red, and as now staked or set out situate in the township of South Crosland, in the parish of Almondbury, in the county of York, together with all houses

1863.
WRIGLEY
V.
THE
LANCASHIRE
AND
YORKSHIRE
RAILWAY
COMPANY.
—
Statement.

1863.
WRIGLEY
v.
THE
LANCASHIRE
AND
YORKSHIRE
RAILWAY
COMPANY.
—
Statement.

buildings, timber, and other trees, hedges, fences, ways, rights, water-courses, members, and appurtenances to the said piece or parcel of land and hereditaments belonging, which piece or parcel of land and premises contain three roods, and thirty-six perches, statute measure, and are part and parcel of certain lands and hereditaments delineated and described in the plan and book of reference relating (amongst others) to the Meltham Branch Railway, deposited with the clerk of the peace for the West Riding of the county of York, on the 30th day of November, 1860, and in the said plan and book of reference numbered 71 in the said township of South Crossland and parish of Almondbury.”

On the plans deposited the land described as 71 in the schedule to the notice was defined on one side of the line of deviation, but on the other side no boundary was shown. A part of the land required by the said notice to be taken lay on the side of the limits of deviation, where the boundary was not marked on the deposited plans.

“ Paragraph 14 was as follows:—A part of the statement in the schedule to the said notice is untrue. Part of the said land described in the said schedule is not defined on the aforesaid deposited plans, or either of them, and is not delineated or described in the said deposited books of reference, or either of them, and is not any part of the lands upon which the company are by their aforesaid acts authorized to enter, or take, or use for their railway, or any of the works thereof.

“ 15. The said notice is dated the 9th day of February last, but in fact it was not served on the plaintiff, nor did the plaintiff ever see it, until the evening of Thursday, the 5th instant. The plaintiff craves leave to refer to the said last-mentioned notice and the plan thereto annexed as part of this his bill.

“ 16. The land in the said last-mentioned notice contain 3 roods and 36 perches, or almost one acre of

land, and includes the 710 yards of land comprised in the said first tracing. The whole thereof is part of the close called Laith Ing, comprised in the said lease of the 10th day of July, 1861, and the same is in front of the windows of the breakfast-room, dining-room, and drawing-room of the plaintiff's said house, and only a very short distance from those windows.

1863.
 WRIGLEY
 v.
 THE
 LANCASHIRE
 AND
 YORKSHIRE
 RAILWAY
 COMPANY.
 Statement.

“ 18. And the plaintiff charges that a large part of the said land in the said last-mentioned notice described, and in the plan thereto annexed and coloured red, is without the line of railway as sanctioned by the aforesaid Acts of Parliament, and beyond also the limits of deviation thereof allowed to the company by law. It is no part of the lands defined in the said deposited plans and books of reference. Moreover, the company have not deviated nor intend to deviate from the line of railway as marked on the said deposited plans. Part of the land included in the said notice is much more than 100 yards from the centre of the said line of railway. The defendants have no power or authority whatever to enter upon, or take, or use that part of the said land for their said branch railway, or any of the works thereof, except with the consent of the plaintiff, and the plaintiff has refused and still refuses to assent thereto.

“ 19. Nevertheless the defendants threaten and intend forthwith to enforce the compulsory provisions of the said Acts with reference to the whole of the said land, and under colour of the said provisions to enter upon and take the whole thereof for their said branch railway, and the station and works thereof, and under colour of their aforesaid Acts they will do so unless restrained by the injunction of this Honourable Court.

“ 20. On the 6th day of March instant, the said Messrs. Brook, Freeman, & Batley wrote and sent to coloured red is in the plan thereto annexed stated to the said W. S. Lawn, a letter of that date, which is as follows that is to say :—

1863.

WRIGLEY
v.
THE
LANCASHIRE
AND
YORKSHIRE
RAILWAY
COMPANY.

—
Statement.

“ Dear Sir,

“ Meltham Branch Railway.

“ Referring to our letter to you of the 26th of January last, and to the repeated objections of Mr. Wrigley to the Lancashire and Yorkshire Railway Company taking his land at Netherton, and particularly to the objections made by him to one of the directors, we are surprised to find that a notice to treat has been served upon Mr. Wrigley. The course taken by the company leaves Mr. Wrigley no alternative but to resort to a Court of Equity for protection, and he has instructed us to file a bill against the company for an injunction.

“ We are, yours truly,

“ BROOK, FREEMAN, & BATLEY.

“ Huddersfield, 6th March, 1863.

“ W. S. Lawn, Esq.,

“ Secretary, Lancashire and Yorkshire Railway

“ Company, Manchester.”

The company did not intend to deviate the said line.

In the book of reference the field was referred to, and the plaintiff's interest described.

Argument.

Mr. *Malins* and Mr. *G. L. Russell* for the motion.

The company could only take such land as was delineated on the deposited plans, *i.e.*, of which the boundaries were defined; here the land outside the line of deviation on one side was not delineated at all. The notice no doubt described the land sufficiently, but that was not enough. The right of the company to take land under their compulsory powers must be referred to the plans deposited, showing what lands are required. If the company could take land compulsorily one yard beyond the boundary line shown on the plans deposited, there was nothing to prevent them from taking land at any distance from such boundary. It was said that the

land in question was described sufficiently in the book of reference as being to the property of the plaintiff, but it was submitted that that was insufficient. It was admitted the company did not require the land in question for any of the works specified in the 16th section of the Railway Clauses Act.

1863.
 WRIGHT
 v.
 THE
 LANCASHIRE
 AND
 YORKSHIRE
 RAILWAY
 COMPANY.
 Argument.

Mr. Osborne and Mr. L. Bird for the defendants.

The 16th section of the Railway Clauses Act authorized the company to enter upon and take all or any of the lands delineated in the deposited plans or described in the book of reference, both for accommodation and permanent works.

There was nothing in any Act(a) to deprive them of this

(a) Sections 15 & 16 of the Railway Clauses Act (8 & 9 Vic. c. 20), are as follows :—

Sect. 15. It shall be lawful for the company to deviate from the line delineated on the plans so deposited, provided that no such deviation shall extend to a greater distance than the limits of deviation delineated upon the said plans, nor to a greater extent in passing through a town, village, or lands continuously built upon than ten yards, or elsewhere, to a greater extent than one hundred yards from the said line, and that the railway by means of such deviation be not made to extend into the lands of any person, whether owner, lessee, or occupier, *whose name is not mentioned in the books of reference, without the previous consent in writing of such person*, unless the name of such person shall have been omitted by mistake, and such omission certified, &c.

Sect. 16. Subject to the provisions and restrictions in this and the special Act, and any Act incorporated therewith, it shall be lawful for the company, for the purpose of constructing the railway, or the accommodation works connected therewith hereinafter mentioned, to execute any of the following works; that is to say, they may make or construct in, upon, across, under, or over any lands, or any streets, hills, valleys, roads, railroads, or tramroads, rivers, canals, brooks, streams, or other waters, *within the lands described in the said plans, or mentioned in the said books of reference* or any correction thereof, such temporary or permanent inclined planes, tunnels, embankments, aqueducts, bridges, roads, ways, passages, conduits, drains, piers, arches, cuttings, and fences, as they may think proper.

1863.
WRIGLEY
v.
THE
LANCASHIRE
AND
YORKSHIRE
RAILWAY
COMPANY.
Argument.

right. Admitting, for argument sake, that the field No. 71 was not fully delineated on the plan, it was described in the book of reference. The language of the section was "or mentioned in the book of reference." The book of reference described the field sufficiently by naming the occupier, and all that was required by the plan was to fix its locality. The company being entitled to take any part of No. 71, they were entitled to take all the land described in their notice to treat. The limit of deviation was no boundary line, and had nothing to do with the question. Section 15, as to limits of deviation, applied only to the construction of the line, and had no application in cases where, as here, the company wanted to build a station.

Judgment.

The VICE-CHANCELLOR:—

It is evident that no part of the field which is now in dispute as described on the deposited plans of reference constituted one close. If so, the company have no power to take the land comprised in their notice, and they must be restrained from doing so.

The order made was that the defendants be restrained until further order from proceeding on the notice dated the 9th of February, 1863, so far as regarded the plaintiff's leasehold interest in the land therein comprised, and from taking any proceeding under the said notice to compel the plaintiff to sell his said interest in the said lands comprised in the said notice, and from entering upon, taking, and using under the said notice, and from taking any proceeding under said notice for the purpose of entering upon, taking, and using.

1803.

BEVAN v. THE ATTORNEY-GENERAL.

April 22, 23.

LEWIS JOHN WOODROW, the testator in the cause, made, by his will dated 26th May, 1854, the following disposition:—

“I nominate and appoint John Haly and William Bevan, merchants, executors of this my will. I direct that all my just debts and funeral and testamentary expenses be duly paid and satisfied by my executors as soon as conveniently may be after my decease. I give and bequeath all and every my household furniture, linen, books, plate, plated goods, china, glass, apparel, jewellery, and pictures to T. Lewis, brother of my deceased mother, for his use and benefit during his life; and after his death I wish them to be inherited by M. Lewis, eldest daughter of W. Lewis, now of Llamnaes House, St. Fagan's, Glamorganshire. I rely, therefore, upon my uncle aforesaid so bequeathing them. I desire that my said executor and partner John Haly may be allowed a period not exceeding one year for converting my proportion of capital invested in the business I am now carrying on with him into cash; and I desire that such cash may be paid over as realized (with the exception of certain special bequests hereinafter-mentioned) to the Charity Commissioners for England and Wales, of the time being, to be invested in whatever stocks may be deemed by them most desirable; and I desire that all shares of which I may die possessed, may be transferred into the names of the said commissioners, without being

Where a testator, having claims against his firm, directed his proportion of capital invested in the business to be converted into cash, such cash to be paid over as realized (with the exception of certain bequests thereinafter mentioned) to a charity, and requested his executors, as soon as convenient after his decease, out of the capital employed in the business to pay the persons mentioned below the following sums &c., the Court held—

First, that the legacies were demonstrative, and not specific, and that if the particular fund failed the deficiency was payable

out of the general personal estate not specially given.

Secondly, that the proportion of capital included not only the testator's share in the assets, but also the debt due from the partner.

Smith v. Fitzgerald, 3 Ves. & B. 2, observed on.

1863.
 BEVAN
 v.
 THE
 ATTORNEY-
 GENERAL.
 —
Statement.

sold, the interest to be paid by them half-yearly as follows:—Say four-tenths to Hannah Hart, widow, sister of my deceased father; and four-tenths to his brother Robert, if to be found; but if not, then the said H. Hart to receive seven-tenths, and the said T. Lewis three-tenths; or if the said Robert be found, the said Thomas will receive two-tenths; the two survivors to divide the share of the first deceased in the same proportions, and the sole survivor to receive the entire amount. After the decease of the three persons above-named, the said commissioners are to pay such interest as follows:—Say three-fifths to the before-mentioned M. Lewis, one-fifth to E. Lewis, and one-fifth to J. Lewis, the two last-named being the second and third daughters of the said W. Lewis. If the death of either of the two last-named take place before the death of Mary, the survivor of the said two to receive the share of the deceased; and if the said Mary die before her two younger sisters, her share to be divided equally between them, the sole survivor to receive the entire amount of such interest. And after the decease of the three persons last above named, sufficient of the property so invested by the said commissioners to be converted by them and paid over to the following societies and charities, for their use and benefit:—250*l.* to the Propagation of the Gospel Society, the like to the Church Missionary Society, the like to the Church Extension Fund, the like to the most eligible institution (as may be determined by the said commissioners) connected with education, and the like sum to the Christian Knowledge Society; 150*l.* to the Cancer Hospital, of which John Parkinson is or was treasurer, the like to a London hospital such as may be in the opinion of the said commissioners most deserving and needful of such bequest, the like to the Merchant Seaman's Orphan Asylum; 100*l.* to the Infant Orphan Asylum, the like to the Blind Asylum, the like to the

Deaf and Dumb Asylum, the like to the most useful institution as may be determined by the said commissioners for Penitent Females, the like to be equally divided amongst the Ragged Schools of the metropolis, the like to the best institution for Idiots, and the like to the same for Reformed Criminals: the interest of the remainder to be paid by the said commissioners in each year, in sums of not exceeding 5*l.* to such poor deserving single persons as may, to the satisfaction of the said commissioners, best prove their claim to such allowance, which I propose as a reward for self-supporting industry, temperance, acquisition of knowledge, cleanliness, and especially for the good performance of the duty of maintaining and supporting with kindness and attention parents who may be dependent for such upon their children, or to sick or incapable members of the family of such persons who may apply for such sums of money, such fund to be called the "Woodrow Fund." The same person (unless under such circumstances as the said commissioners may approve) is not to receive the allowance during two successive years. Should the property be insufficient to pay the sums, as above stated, to the said charities and societies, then the division to be made in proportion, but I should wish that not less a sum than at least 200*l.* be set apart for the last-mentioned purpose, and I request my executors will pay, as soon as conveniently may be after my decease, out of the capital employed in the business, to the persons mentioned below, the following sums:—

"To each of my executors, 50*l.*"

Then followed a list of legacies. By a codicil dated the 3rd October, 1857, he nominated a Mr. Stringer as executor in place of Mr. Haly. The testator died on the 4th November, 1860, and his will was duly proved by his executors.

At the date of the said will (May, 1854), the testator

1863.
BY
THE
ATTORNEY-
GENERAL.
—
Statement.

1863.
BEVAN
v.
THE
ATTORNEY-
GENERAL.
—
Statement.

was carrying on business in partnership with Mr. John Haly, in the will named, under the firm of John Haly & Co., as insurance brokers and general merchants. This firm subsequently stopped payment, and the creditors of the said firm accepted a composition on their respective debts, the whole amount of which or the greater part thereof was paid by the testator out of his private property. The assets of the firm of Haly & Co. were not wholly realized, but the partnership between the said testator and the said John Haly had for many years past been wholly dissolved, except for the purpose of winding up the affairs thereof, and it was believed that the said firm was indebted to the testator's estate in a considerable sum.

After the dissolution of the partnership with Haly, the testator for a short time carried on a similar business alone, and at the time of his death there were monies due to the testator in respect of that business, which had been got in by the executors.

At the time of the testator's death he was carrying on a similar business in partnership under the firm of Woodrow, Reynolds, & Co., and he was also a partner in an iron business at Bristol under the firm of Woodrow & Bell. The said two last-mentioned partnerships ceased upon the death of the said testator, and the sums due to the testator from the firms of Woodrow, Reynolds, & Co., and Woodrow & Bell, were also got in by the executors.

The Charity Commissioners for England and Wales declined to accept and disclaimed the bequest to them in the said will contained, but stated that, if hereafter it should be convenient that they should make the selection of charities to receive, there would be no difficulty in making the selection.

The executors ultimately filed this bill alleging that doubts had arisen as to the construction of the will, and praying to have the will administered in this Court.

The only next of kin of the testator at his death was Hannah Hart, except Robert Woodrow, if living, but who could not be found. Thomas Lewis and Mary Lewis died in the testator's lifetime; Eliza Lewis and Jane Lewis were still living.

1863.
BEVAN
v.
THE
ATTORNEY-
GENERAL.
—
Argument.

Mr. *Malins* and Mr. *Dickinson*, for the executors.

The question in dispute now is, whether these legacies are specific and liable to fail, in case the fund fail wholly or in part, or whether they are pecuniary and demonstrative, and to be paid, in case the particular fund fail, out of the general personal estate.

In *Fowler v. Willoughby*(a) a gift of a sum of money directed to be paid out of the proceeds of the sale of an estate was held payable out of the general assets, in case the sale could not be effected.

In *Saville v. Blacket*(b) it was held that where a legacy was given out of a fund which failed the legacy was payable out of personal estate.

In *Kirby v. Potter*(c) a legacy of 1000*l.* of testator's Reduced Bank Annuities was held pecuniary, the Court leaning against holding a legacy specific unless clearly intended.

In *Fream v. Dowling*(d) the decree, as varied by the Lords Justices, declared that legacies, directed by the will to be paid out of the proceeds of real estate directed to be sold (the remainder being given over), should be paid out of the real estate and general personal estate not specifically bequeathed.

On these authorities it was submitted that the legacies were payable out of the testator's general estate in case the capital in the business should prove insufficient.

Mr. *Craig* and Mr. *Bedwell*, for legatees, took the same view as the executors.

(a) 2 S. & St. 354.

(b) 1 P. Wms. 778.

(c) 4 Ves. 748.

(d) 20 Beav. 624.

1863.
 BEVAN
 v.
 THE
 ATTORNEY-
 GENERAL.
 —
Argument.

In *Sparrow v. Josselyn* (a) a bequest of 10,000*l.* sterling, being "my share of the capital now engaged in the banking business," was held to be a demonstrative, and not a specific legacy. In *Ellis v. Walker* (b) a gift by one partner to the other, "of 2000*l.*, which appears to be due to him on the last settlement, if he did not draw it out," was held specific only, by reason of the last words. In that case Lord Hardwicke said the Court leaned against considering a legacy, specific.

[*Colville v. Middleton* (c), and *Badrick v. Stevens* (d) also cited.]

Mr. *Osborne* appeared for *Eliza* and *Jane Lewis*.

Mr. *Bacon* and Mr. *Field*, for the next of kin.

These legacies are specific, and if the fund given for the payment of them fail or prove insufficient the legacies must fail or abate. It is a fact that the capital invested in the business of the firm of *Haly & Co.* was insufficient, and the legacies must abate *pro tanto*.

In the case of *Coard v. Holderness* (e) the testator gave the legatee the amount which testator's son owed such legatee, and directed the legacy to be paid out of his son's share: such share proving insufficient, the Court held that the legacy was not demonstrative, but was only payable by means of the son's share.

In *Williams v. Hughes* (f) legacies given by the testatrix out of her brother's estate, payable after the death of A., were on the will held specific, and payable out of real estate, though in the codicil (g) it was held there was an intention that they should be paid in any event, and that they must be treated as demonstrative.

In *Gordon v. Duff* (h) the same judge held that a gift

(a) 16 Beav. 135.

(b) Ambler, 309.

(c) 3 Beav. 507.

(d) 3 Br. C. Ca. 431 (note in

Bell's edition gives Lord Thurlow's observations).

(e) 23 Beav. 391.

(f) 24 Beav. 474.

(g) *Ibid.* 482.

(h) 28 Beav. 519.

of "the sum of 2000*l.* Long Annuities standing in testatrix's name in the books of Governor and Company of Bank," was specific, payable not out of general estate, but out of the Long Annuities of the testatrix.

In *Dickin v. Edwards*(a) a gift of 1000*l.* directed to be raised by trustees by sale of timber was held not to be charged on the general personal estate.

[*Hancox v. Abbey*(b) and *Spurway v. Glynn*(c) were also cited.]

The VICE-CHANCELLOR:—

There is great difficulty in this case. I do not think that the authorities are entirely reconcilable. Some of the later decisions have gone to a great extent in holding legacies to be specific when no more was done than to point out the fund out of which they were to be paid. The case now before the Court is one in which pecuniary legacies or legacies of quantity are directed to be paid out of a certain specific fund. If that be so, that is exactly the definition of a demonstrative legacy. In the case of *Smith v. Fitzgerald* (d) the definition and peculiarities of a demonstrative legacy are exactly what I have stated. In every case of a demonstrative legacy there is a specific fund. In this case it is a great peculiarity that the specific fund, which is said to be that demonstrated by the testator as primarily applicable to pay the legacies, is itself the subject of a clear specific legacy, with an exception out of it of the sums directed to be paid as pecuniary legacies. But on an attentive consideration that seems to me to make no difference. There is authority to show that, if the fund out of which the legacy is to be paid be specified, it cannot affect the question in the least whether the fund so specified is the subject of a specific gift itself after the legacies are paid. In the

1863.
BEVAN
v.
THE
ATTORNEY-
GENERAL.
Argument.

Judgment.

(a) 4 Hare, 273.

(b) 11 Ves. 179.

(c) 9 Ves. 483.

(d) 3 V. & B. 2.

1863.
BEVAN
v.
THE
ATTORNEY-
GENERAL.
—
Judgment.

case of *Smith v. Fitzgerald* the testator had a debt due to him from the Nabob of Arcot. That debt he mentions in his will, and out of that debt he directs a number of legacies to be paid. He describes the debt as outstanding—not yet recovered—and expresses some degree of uncertainty as to the amount that may be recovered. But he estimates the amount, and one of the questions in the case was, whether the residue of that debt, which was indicated as the fund out of which the pecuniary legacies were to be paid, was specifically given to two individuals named in the will, or passed under the gift of the general residue. Sir William Grant decided both questions. He first decided the question as to whether the indication of that specific fund out of which the pecuniary legacies were to be paid made those pecuniary legacies specific, or, in other words, made the payment of them depend on the sufficiency or existence of the fund out of which they were to be paid. Then he decided the other question as an entirely independent question, and wholly unaffected by the consideration whether or not the remainder of the fund was specifically given to two persons of the name of Smith or not. But the Master of the Rolls was there dealing with a gift of pecuniary legacies directed to be paid out of a fund as specifically described, and as completely separated from the rest of his assets as could occur or has occurred in any case. He says, “The first question is, whether the legacies given out of the debt of the nabob are to be considered as specific; or, in other words, whether that debt, whatever its amount might be, was not intended to be divided among the legatees. The same legacies may be specific in one sense and pecuniary in another.” After referring to another case, the Master of the Rolls said, “My opinion is, that these legatees are entitled to nothing more than the sums of money bequeathed to them, with interest thereon from the time of payment, which seems

to be fixed by the testator himself, to the time when the debt should be recovered, and the trustees admit that it is to be considered as recovered from the time of the agreement between the nabob's creditors and the East India Company." Then he goes on to deal with the other question as an entirely separate one. Having disposed of that question he might or might not have decided that the remainder of the debt was given specifically to the persons indicated, or that it passed by the gift of the general residue. He decided, expressing great difficulty on the subject, that it passed by the gift of the general residue. That case seems to me entirely to govern the present. The law laid down in that case seems to me to be perfectly sound law; sound, treating it as a legal principle; sound, as consistent with the principles of common sense; because, if a man gives to a person a legacy of 50*l.* stating that that legacy is to be paid out of a certain specified part of his property, the primary intention is to give 50*l.* to the legatee. The rest seems to amount to no more than convenience—what his purpose was in the administration of his assets. But the consequence of holding that the gift of a pecuniary legacy of that kind is specific is this—that the testator clearly indicating an intention that the legatee shall have the money, though he has assets abundant to pay it, yet if any alteration in the property takes place (if, for instance, a bond-debt due to himself happens to be paid off), the gift totally fails. That is quite contrary to what can be rationally imputed to a testator.

Apply that principle to the present case, which is that of a partner in a certain partnership. The testator indicates his share in the capital of that partnership as a fund out of which these legacies are to be paid. He makes a specific gift of his share in the capital of the partnership, but he excepts from that the pecuniary bequests now in question. Afterwards he desires his executors to pay the

1863.
 EVAN
 v.
 THE
 ATTORNEY-
 GENERAL.
 Judgment.

1863.
 BRYAN
 v.
 THE
 ATTORNEY-
 GENERAL.
 Judgment.

pecuniary legacies which he mentions, and again he indicates his share in the capital of the concern as a fund out of which they are to be paid. Suppose in the testator's lifetime the partnership had been dissolved, and that he had received 20,000*l.*—far more than enough to pay these legacies: the specific fund which he had indicated as applicable for the payment being in his own possession in a different shape, and there being an abundance of assets: surely it would be a most extraordinary intention to impute to the testator that a mere gift of money, not given as an aliquot part of his share in the partnership, not given specifically, but only having a sufficient fund indicated for its payment—it would be a strange violation of what would naturally appear to be the intention of the testator to say, because he had got into his pocket the fund which he intended his executors to pay to them, and that fund was in the executors' hands after his death, that therefore the legatees were to take nothing.

It is scarcely necessary to enter into an examination of the more recent cases which have been very properly relied upon as tending to show that in this case the Court would be justified in holding that these were specific legacies, the payment of which must depend upon the existence of the fund which is directed to be applied for their payment; for I do not find that in any of these cases the case of *Smith v. Fitzgerald*, which was carefully and elaborately argued, and decided by one of the greatest judges that ever sat in this Court—a decision which follows decisions of Lord Eldon, of Lord Thurlow, and of Lord Hardwicke—was cited or referred to. I cannot impute to any of the judges who have recently dealt with this question an intention of overruling a case that seems to me to depend on a principle so perfectly sound. Therefore I find myself bound to hold that in this case the payment of these legacies does not depend upon the existence of the fund indicated by the testator for the

1863.
—
BRYAN
v.
THE
ATTORNEY-
GENERAL.
—
Judgment.

purpose of convenience or otherwise, as that out of which the legacies ought to be paid. I may also observe this—that in the words by which the testator directs his executors to pay these legacies in money, the reference to the share in the capital seems rather parenthetical, and is in very inaccurate language, for he says: “I request my executors will pay, as soon as conveniently may be after my decease, out of the capital employed in the business, to the persons mentioned below, the following sums.” Now, there, if you read it thus, the essential part in the gift of the legacies is the direction to pay: “I request my executors will pay, to the persons mentioned below, the following sums, as soon as conveniently ” may be after my decease and out of the capital; the latter words, seemed to be used parenthetically for the purpose of convenience, and it seems to me that the right of the legatees no more depends upon the direction to pay “out of the capital” than on the words “as soon as conveniently may be.” They are ancillary directions, and in my mind they are not of the essence of the bequest. The gift is not of a share of the capital, but the capital is indicated as the property out of which it may be conveniently paid.

As to the other question, which does not arise directly, I think, when the testator speaks of his capital, he meant to give all that was coming to him out of the assets of the partnership.

After some discussion it was declared that, according to the true construction of the will, the several sums which the testator directed his executors to pay as soon as conveniently might be after his decease out of the capital employed in the business, were not specific legacies, but were demonstrative legacies, and were primarily payable out of the testator's proportion of capital employed in the business (Haly's); and that if such proportion should be insufficient to pay such legacies in full

1803.
 BEVAN
 v.
 THE
 ATTORNEY-
 GENERAL.

Judgment.

the deficiency was to be made good out of the general personal estate not specifically bequeathed; and that Hannah Hart, as the next of kin of the testator, was entitled to be paid the clear residue of such personal estate. It was also declared, that such proportion of capital as aforesaid included the whole share and interest of the testator in the assets of the business (Haly's), including the debt of 264*l.* 2*s.* 3*d.*; and it was directed that the residue (if any) of such proportion of capital as aforesaid should be invested, and the interest of the fund and of the shares be paid to Hannah Hart for life, then to Eliza and Jane Lewis in equal shares, with survivorship between them. It was also declared that the two sums of 48*l.* 16*s.* 1*d.* and 268*l.* 4*s.* 9*d.* formed part of the general personal estate.

March 10.

CHARLTON v. COOMBES.

Demurrer by a solicitor to produce letters written to him by his client about the time and in respect of a matter impeached by a bill as fraudulent, to which the solicitor was not made a party, nor charged with fraud—
 Allowed.

THOMAS ALCHIN, by his will, bequeathed the sum of 2500*l.* to the plaintiffs John Sills Charlton and Thomas Charlton (whom he also appointed his executors) upon trust to invest the same, and as to 1000*l.* part thereof to pay the income to his niece Mary Ann Andrus, then the wife of William Andrus, for her life, and after her decease to transfer the same to her children as therein mentioned. The testator bequeathed all his real estate, and the residue of his personal estate, unto the said J. S. Charlton and T. Charlton, their heirs, executors, administrators and assigns, according to the nature

thereof respectively, upon trust to call in and invest such part of the personal estate as might not be invested, and to collect and receive the rents of the real estate, and, after deduction from the principal moneys of the said sum of 2500., to pay the income of the residue to his niece the said Mary Ann Andrus and three other persons in equal shares during their respective lives, the share of the said M. A. Andrus to be for her sole and separate use and without power of anticipation. The testator further directed that, when and so soon as either of the said four persons should die leaving lawful issue of his or her body, the trustees should sell the real estate and stand possessed of the moneys, and also of the personal and residuary estate, upon trust to pay and apply the annual income thereof equally amongst the survivors and the children of such as might be dead, the shares of the parents to vest in the children at twenty-one, with benefit of survivorship and accruer amongst them.

By a third codicil to his will, dated the 13th December, 1852, after reciting that the said William Andrus was then dead, leaving the said Mary Ann Andrus his widow, the testator declared as follows:—

“That, in case and when the said M. A. Andrus should marry again without having the previous consent of both his said executors and trustees, or his executors and trustees for the time being, the interest, dividends, and other moneys, and all other benefit given to her in and by his said will, should cease, end, and determine, and that in lieu and instead thereof she should have, and he did in that event give and bequeath unto her for her natural life and for her own separate use and benefit, the clear yearly sum of 50*l.* sterling to be paid to her by equal quarterly payments.”

The testator further directed that the surplus dividends, interest, and proceeds over and above the said sum of 50*l.* “which she would have been otherwise entitled

1863.
CHARLTON
v.
COOMBS.
—
Statement.

1863.
 CHARLTON
 v.
 COOMBES.
 —
Statement.

to had she remained a widow," should go and be applied amongst her child and children as therein mentioned.

The testator died on the 6th March, 1854. Mrs. Andrus, without the consent of the trustees and executors of the testator's will, married the defendant Edward Coombes. The trustees during some time paid the income of the legacy and share of residue bequeathed by the will to Mary Anne Coombes, in the belief that she was still unmarried. In January, 1856, representing herself unmarried, she requested the plaintiffs to consent to her marriage with Edward Coombes, but they refused to do so.

The present bill alleged that in February, 1856, Mary Ann Andrus, under the name and description of Mary Ann Andrus, widow, filed a bill in this Court, alleging the refusal of the trustees to consent to her marriage with Coombes, and praying that the trusts of the will might be administered by the Court; also that the plaintiff Mary Ann Andrus might be indemnified in respect of a mortgage of the 18th November, 1846.

The present bill alleged that this suit was instituted by Mrs. Andrus after her marriage with Coombes. In April, 1856, the plaintiffs filed a cross bill against persons administering the trusts of the will.

By an order made in both suits in July, 1856, His Honour directed a sum of 1000*l.* Consols to be transferred into court, in trust in the causes to an account to be entitled, "The legacy account of the plaintiff Mary Ann Andrus, subject to duty," and the dividends were ordered to be paid to M. A. Andrus, subject to further order.

The chief clerk certified, in March, 1857, that Mary Ann Andrus had six children (who, with the husbands of two of them, were defendants to the present suit). He also found that the plaintiffs had paid to M. A. Andrus, on account of her interest in the residuary estate, the sum of 342*l.* 10*s.* 1*d.*; and that there was due from

M. A. Andrus to the testator's estate, upon an indenture of mortgage dated 18th November, 1846, the sum of 1000*l.* with interest, making together (less sums retained by the plaintiffs) the sum of 1133*l.* 17*s.*

In the certificate was an affidavit sworn in the causes, by Mary Ann Coombes, in the name and by the description of Mary Ann Andrus, widow, to the effect that she had not since the death of her husband William Andrus contracted marriage with any person, but was still his widow.

The cause came on for further consideration in December, 1857, when a decree was made whereby it was ordered that the costs of Mary Ann Andrus should be taxed and paid to Mr. Charles Edward Lewis, her solicitor; and it was directed, that after payment of the mortgage debt of 1000*l.* interest and rent, with interest and the costs relating to the mortgage inquiry, one-fourth part of the rents and profits of the real estate should be paid to Mary Ann Andrus during her life, or until further order.

On the 6th March, 1862, Mary Ann Andrus died.

On the 25th March, 1862, this bill were filed, the plaintiffs having only within a few weeks previously discovered that Mary Ann Coombes was married to the defendant Coombes.

The bill charged that the concealment of the marriage and the statement in the affidavit were a fraud upon the plaintiffs, upon M. A. Coombes's children, and upon the Court, and that the defendant Edward Coombes colluded with his wife with intent to deceive and defraud the plaintiffs.

Paragraph 25 was as follows:—"The defendant Edward Coombes sometimes pretends that until recently he was ignorant of the terms or effect of the said third codicil to the said testator's will, and that, before the said bill in the said suit of *Andrus v. Charlton* was filed, he and the said Mary Ann Coombes informed their solicitors

1863.
CHARLTON
v.
COOMBES.
Statement.

1863.
CHARLTON
v.
COOMBES.
—
Statement.

of their marriage, and that the said bill was filed in the name of Mary Ann Andrus, as if she were still the widow of the said William Andrus, with their knowledge or privity; and he pretends that he is therefore not responsible for the said proceedings, nor for the erroneous payments that have been made. The plaintiffs, however, charge the contrary of such pretences to be truth."

The bill prayed for an account as against Edward Coombes, on the footing of the overpayments which had been paid to Mary Ann Coombes as aforesaid, and that he was a party to the fraud.

Mr. James Lewis, of Rochester, the solicitor who filed the bill in the name of Mary Ann Andrus, was called as a witness on the part of the plaintiffs, and was also examined on the part of all the defendants except Coombes.

Being sworn on the 16th February, 1863, he deposed that Coombes had been a client of his for ten years past. Deponent was introduced to Mrs. Andrus on the 13th September, 1854, with reference to her affairs under the will, and generally, by the uncle of the defendant Coombes. Deponent had all his books with him, but declined to produce them on the ground of privilege. He was first informed of the proposed marriage by Mrs. Andrus. The trustees declined to give their consent. Deponent thought that Mr. John Coombes (the uncle) knew that if Mrs. Andrus married without consent she would lose a portion of her income. Mrs. Andrus gave deponent instructions to file the bill. On several occasions the defendant used to drive Mrs. Andrus over to Gravesend, and deponent met her at an hotel there. Deponent knew that they were desirous of marrying, but could not get the consent of the trustees. She was quite a woman of business. Deponent thought the defendant Coombes knew if Mrs. Andrus married without consent she would lose part of her income, but he could not

say when defendant first became acquainted with it. Deponent advised them not to marry. Deponent first discovered that they were married a month or two before Mrs. Andrus' death. Mr. John Coombes told deponent of it, and deponent was very angry that he had been so deceived.

1868.
CHARLTON
v.
COOMBES.
Statement.

Being examined on the same day, on behalf of the defendants, deponent said, "My advice to them both, not to marry, was repeated after defendant Coombes knew of the institution of the suit of *Andrus v. Charlton*. . . . My book would not show when the defendant Coombes was present at any interviews with Mrs. Andrus at Gravesend. I cannot recollect the particulars of any conversation I had with her in the defendant Coombes's presence. I had frequently letters from her. I have no letters from the defendant Coombes on this subject." Q.—"Will you produce her letters?" A.—"I decline to produce them, on the ground that she was my client at the time I received them."

Counsel for the defendants except Coombes having offered, on their behalf, to waive the privilege, if any, the deponent still declined to produce the letters.

The one demurrer was set down by the plaintiffs, and the other by the defendants other than Coombes, and now came on for argument.

Mr. *Malins* and Mr. *Speed* for the motion.—If Mrs. Andrus were living, it was clear she could not refuse to produce the letters, nor could her solicitor. Then, how could her death affect the question?

Argument.

The admitted rule, that the solicitor should not be permitted to disclose confidential communications made to him by his client, had no application to the case of fraud. But it was said the solicitor must be a party to the fraud in order to bring the case within the exception, but that was not the rule of law on this subject.

1868.
 CHARLTON
 v.
 COOMBS.
 Argument.

The privilege was that of the client, and not that of the solicitor, and the fraud of the client, without any participation therein by his solicitor, at once took the case out of the rule in favour of the privilege. Here the bill was filed alleging a case of fraud on the part of Mrs. Andrus (the client) and if the defendant Coombes, to which the solicitor was at most only an innocent party. It was submitted, therefore, that the privilege did not apply.

Mr. *J. N. Higgins* in support of the demurrer.—The question stood now exactly as if Mrs. Andrus were living. The contrary doctrine was not pretended; the general rule was, that all communications between solicitor and client involving professional confidence are privileged: *Herring v. Cloberry* (a). This rule was discussed and considered in *Greenough v. Gaskell* (b), by Lord Brougham, assisted by Lord Lyndhurst, Chief Justice Tindal, Baron Parke, and also by Vice-Chancellor Knight Bruce, in *Pearse v. Pearse* (c). The rule was not confined to litigation actually commenced or in contemplation: *Herring v. Cloberry* (d). Within its operation were included all documents delivered to and all entries made by the solicitor: *Greenough v. Gaskell* (e); and extended to facts communicated to the client: *Pearse v. Pearse* (f).

The rule was absolute as to the solicitor, though modified as to client (g). There was a distinction taken between the privilege of the client and the right of the solicitor, in the latter case a duty being superadded: *Thompson v. Falk* (h); the violation of which would be a great offence: *Chotmondley v. Clinton* (i); which would be restrained by the Court: *Beer v. Ward* (j). The same

(a) 1 Phill. 91.

(b) 1 M. & K. 98.

(c) 1 De G. & Smale, 28.

(d) 1 Phill. 91.

(e) 1 M. & K. 100.

(f) 1 De G. & Smale, 28.

(g) Ibid.

(h) 1 Drew. 25.

(i) 19 Ves. 267.

(j) Jac. 82.

1868.
 CHARLTON
 v.
 COOMBS.
 —
 Argument.

principle was laid down in *Wilson v. Rastall* (a), in which Mr. Justice Butler said a solicitor's mouth was for ever shut. In this Court a suit might be maintained to prevent a solicitor from disclosing the confidential communications of his client: *Lewis v. Smith* (b); and if a solicitor gave such evidence, it would be suppressed at the instance of the client: *Sandford v. Remington* (c); even at law: *Taylor v. Blacklow* (d). It was clear that in such a case it was the duty of a solicitor to demur to the interrogatory seeking a disclosure: *Morgan v. Shaw* (e).

It is clear that, if Mrs. Andrus were alive and a party in the suit, the discovery sought could not be obtained from her: *Pearse v. Pearse* (f), *Thompson v. Falk* (g); and further in case of a criminal charge which is made, she would not be bound to criminate herself. The only case in modern times where such discovery has been given was a case of fraud: *Warde v. Warde* (h), *Reynell v. Spyre* (i). It was a personal privilege, and survived to the executor: *Parkhurst v. Lowten* (j), *Russell v. Jackson* (k); nor did the death of his client make any difference: *Herring v. Cloberry* (l). The only exception was in a case of fraud, where the solicitor allowed himself to be made a mere tool, which was not so much an exception as that the rule did not apply: *Follett v. Jeffryes* (m).

Lastly, the privilege could not be waived except by the client herself.

On these grounds it was submitted that the demurrer must be allowed.

(a) 4 T. R. 753, 759.

(b) 1 Mac. & Gor. 417.

(c) 2 Ves. 189.

(d) 3 Bing. N. C. 235.

(e) 4 Mad. 56, 57.

(f) 1 De G. & Sma. 11.

(g) 1 Drew. 27.

(h) 3 Mac. & G. 365.

(i) 10 Beav. 51.

(j) 1 Mer. 391.

(k) 9 Hare, 387.

(l) 1 Phill. 91.

(m) 1 Sim. N. S. 3.

1863.
 CHARLTON
 v.
 COOMBS.
 —
 Judgment.

May v. Hawkins (a), Fallett v. Jefferyes (b), Russell v. Jackson (c), Parkhurst v. Lowten (d), Kelly v. Jackson (e), Reg. v. Avery (f), Reg. v. Hayward (g), were cited—See Peter v. Watkins (h).]

The VICE-CHANCELLOR:—

There appears to be no case in which it has been expressly decided whether the death of the client in any way affects or modifies the rule. In *Herring v. Clobery* the objection appears to have been taken, but was not noticed by Lord Lyndhurst in his judgment. There can be no doubt that, if a solicitor is a co-conspirator with a defendant in the cause, in concocting a fraud in respect of which the suit seeks relief, privilege does not cover such a case; because, as Lord Cranworth said in *Fallett v. Jefferyes*, the Court cannot permit it to be said that the contriving of a fraud forms part of the professional business of an attorney or solicitor. In that case the bill sought relief in respect of a fraud, and the bill charged that the defendant Taylor, an annuitant, and his wife, and the defendant Jefferyes, a residuary legatee, with a view to his own interest, and also with a view to the interests of the other residuary legatees, “took counsel together, and with their respective solicitors, in order to devise some means of defeating the title of the plaintiffs to the annuity.” In that case there was a strong charge introduced advisedly into the bill, for the purpose of raising the question of the conspiracy, and of obtaining discovery. But the Court held that the transaction, according to the account of it given in the bill and answer, was not a fraud; and, therefore, that the solicitor was not bound to set forth the contents of the letters.

In the present case there is not a single passage in the

(a) 11 Ex. 210.

(b) 1 Sim. N. S. 1.

(c) 9 Hare, 387.

(d) 2 Swanst. 216, 221, note.

(e) 13 Irish Eq. 129.

(f) 8 Car. & P. 596.

(g) 2 Car. & K. 234.

(h) 3 Bing. N. C. 421.

bill which charges the solicitor with the fraud in respect of which relief is sought, nor is there any passage which connects him with any fraud. The solicitor was employed by the client in the ordinary way. The bill no doubt says that the client committed a fraud; but in order to take the case out of the privilege, there must be some specific charge in the bill connecting the solicitor with the fraud. After stating that he could not recollect the particulars of any conversation with her in the defendant Coombes's presence, and that he had frequently had letters from her, he is asked, "Will you produce her letters?" He answers, "I decline to produce them, on the ground that she was my client at the time I received them." There is no particular charge in the bill as to these letters, and I think, therefore, that the solicitor very properly refused to produce them. The defendants must have the costs of both demurrers.

1868.
 CHARLTON
 v.
 COOMBS.
 —
Judgment.

1863.

July 6, 7, 8.

CHARLTON v. COOMBES.

A testator having bequeathed the dividends of a fund to his niece for life, remainder to her children, by a codicil reciting that her husband was dead declared that in case she married again without the consent of the trustees she should forfeit the legacy and take only 50*l.* a year. The niece without the consent or knowledge of the trustees married, received the dividends for some time, and died. On a bill by the trustees against the husband (who denied knowledge of the clause of forfeiture) the Court declared the husband subject to the liabilities that affected the wife.*

THE testator in this case by his will gave certain property on trust for his niece M. A. Andrus, then the wife of W. Andrus, for her life, to her separate use, remainder to her children. Shortly after the death of W. Andrus the testator made a codicil to his will, in which, reciting Andrus's death, he directed that in case Mrs. Andrus should marry again without the consent of the trustees named in the will she should lose the benefits given by his will, and should take only an annuity of 50*l.* per annum for her life.

Subsequently to the testator's death, Mrs. Andrus applied to the trustees for their consent to her marriage with the defendant Coombes, and they having refused (it was stated at the bar that it was against this very connection that the proviso in the codicil was directed), Mrs. Andrus in 1854 married the defendant Coombes privately and concealed the marriage. She continued to go by the name of her first husband, and received the benefits under the will of the testator on the footing that she was still a widow. In 1856 she filed a bill against the trustees, in which she described herself as Mary Ann Andrus, widow, and in support of the claims made by that suit she filed affidavits in which she deposed that she was still unmarried. Several payments were made to her under the orders of the Court in the suit. She and her husband did not reside together, though on terms of apparent intimacy. In 1862 Mrs. Andrus died. Shortly after her death the trustees became aware of the concealed marriage, and filed a bill against Coombes, charging that he had been guilty of fraud, and had in-

* See *antè* p. 372.

duced his wife to commit perjury, and alleging that he had knowledge of the forfeiture clause, and was privy to the false representation and statements on which she filed the bill. The bill prayed that the defendant might be decreed to recoup the trustees in the amount improperly paid to her as aforesaid.

Coombes by his answer positively denied that he was aware of the forfeiture clause contained in the will of the testator, or that the consent of the trustees was necessary to the marriage. He also denied all knowledge of the affidavit made in the suit of *Andrus v. Charlton*, or that the bill was filed with his privy or knowledge.

He alleged that he married his late wife in secret on the ground that some of her children had threatened to do him some bodily injury. After his marriage he concealed it because he felt he "had got into a hornets' nest," and wished to avoid them.

The principal witness called on behalf of the plaintiffs was Mr. Lewis, of Rochester (a), who had been examined.

1803.
CHARLTON
v.
COOMBES.
Statement.

Mr. *Malins* and Mr. *Speed* for the trustees.—A husband is liable for wrongful acts committed during coverture. In *Adair v. Shaw* (b), the assets of an intestate, to whom a *feme covert* had taken out letters of administration, having been wasted, and the husband having died leaving the wife surviving, the Court held the husband's assets chargeable in equity for the waste committed during coverture. The same principle was acted on by Lord Cottenham in *Tyler v. Bell* (c). In the case of *Head v. Briscoe* (d), a husband was held liable for a libel published by his wife, who was separated from her husband, there being no proof of adultery. Lord Chief Justice Tindal in that case said, "There is no doubt in point of law that a

Argument.

(a) See *antè*.

(b) 1 Sch. & L. 243.

(c) 2 M. & Cr. 89.

(d) 5 C. & Payne, 484.

1803.
 CHARLTON
 v.
 COOMBES.
 Argument.

husband, so long as the relation of husband and wife continues, is answerable to a third person for what is done by the wife."

It is clear that the receipt of this money was a wrongful act on behalf of the wife. It is clear, too, though that is not necessary for this case, that the husband was cognizant of his wife's acts, and had the benefit of the money so improperly obtained by her fraud.

Mr. *Greene* and Mr. *Talfourd Salter* for the children.— In *Clough v. Bond* (a), the principle laid down in *Adair v. Shaw* was acted on by the Court, and the assets of the husband of an administratrix declared liable to make good the defalcations of the administratrix. In *Vaughan v. Vanderstegen* (b) Vice-Chancellor Kindersley established the same doctrine. [*Manby v. Scott* (c), *Savage v. Forster* (d), *Waithman v. Wakefield* (e), *Blades v. Free* (f), *Edwards v. Farebrother* (g), and *Montague v. Benedict* (h), were also cited.

Mr. *Bacon* and Mr. *Hallett*, for the defendant Coombes, contended that the evidence failed to show that Coombes was privy to the improper conduct of the wife. The bill charged perjury and fraud, and those charges must be proved. Supposing them proved against Mrs. Andrus, was the husband liable for his wife's perjury and fraud?—Clearly not. This was not a mere bill for an account. The case made and relied on was that the defendant had himself been guilty of fraud, but there was not a tittle of evidence to prove what was the equity of the bill. It was submitted, therefore, that the bill must be dismissed with costs.

(a) 3 M. & Cr. 490.
 (b) 2 Drew. 383—5.
 (c) 2 Smith L. C. 375.
 (d) 9 B. & C. 161.

(e) 1 Camp. 120.
 (f) 9 Mad. 35 (ca. 18).
 (g) 3 Con. & P. 524.
 (h) 2 Smith L. C. 408.

The VICE-CHANCELLOR:—

The evidence of Mr. Lewis establishes against the defendant Edward Coombes the allegation of the bill, as to his knowledge of the condition in the will upon which, by his wife's marriage, this property would be forfeited and become the property of the children of his late wife.

There is no doubt as to the case so far as it relates to the late Mrs. Coombes. She knew well that by her marriage with Coombes the whole of her property would become forfeited and become the property of her children. Knowing that, she made it a condition that the marriage should be kept secret.

The defendant's case is, that he was wholly unaware that the condition in the will would work a forfeiture of his wife's interest in the property, and he has endeavoured to make out a case, as a reason for concealment being desired by his wife, that ill-will and quarrelling existed between himself and some of her children, on account of his attentions to their mother. When a defendant charged with fraud of this kind positively and distinctly denies it, and when against his denial there is evidence which the Court is bound to weigh, the greatest caution and circumspection are necessary in dealing with the evidence on both sides. But I have had the satisfaction in this case of hearing the evidence of Mr. Lewis, upon which the case mainly depends, criticised and commented upon in such a way as that every weakness has been extracted from it. Looking at in the most favourable point of view, it seems a highly improbable thing that the defendant Coombes, who was about to marry this lady, and who admits that he was aware of her right to property under this will, having agreed with her to conceal the marriage, could have been wholly innocent and ignorant of all knowledge of the true motive for this concealment, or of the nature of his wife's title to the property.

If the case were one to which the doctrine of con-

1868.
 CHARLTON
 v.
 COOMBES.
 Judgment.

1880.
CHARLTON
v.
COOMBS.
—
Judgment.

structive notice were applicable, it would be free from all doubt whatever, because, independently of the evidence of Mr. Lewis, there are other circumstances which would bring that doctrine into operation. But constructive notice is out of the question. There must be evidence sufficiently clear and distinct to satisfy the conscience of the Court upon the question before it sufficient to enable the Court to say whether the husband was or was not aware of the condition which attached to the property of his wife. The defendant says he was not; and all his evidence tends to support the probability of his ignorance. The law recently introduced, which permits a man to give testimony for himself, has made the defendant's declaration on this subject evidence; but the value of evidence of this kind must be subject to all those considerations which arise from the circumstances of the interest and situation of the person who gives evidence in his own favour. Mr. Lewis is a professional man of established character. He had been consulted by Mrs. Coombes and by the defendant Coombes himself, and, in one passage from his evidence he states what passed between them with reference to knowledge on the part of the defendant Coombes that the wife would lose her property if she should marry. Mr. Lewis says, "I advised them both not to marry." Now, advice of that kind would be discussed, and the reasons for it considered. One reason for that advice probably was, that the defendant would get into a "hornet's nest,"—a disagreeable situation—being at ill-will with the sons and other members of the family. Another reason was that Mrs. Andrus would lose the whole of her property if she married. That was a reason which could not escape the attention of any intelligent legal adviser. It seems probable that Mr. Lewis would take care to communicate these reasons to the parties, and, indeed, it would be a singular thing if he did not, though he might be cautious

in doing so. He proceeds to say, "This was before and after the hearing of the suit. I had some conversations with the defendant Coombes upon that subject." That subject seems to have been the suit. This question is then put—"From your conversation with the defendant Coombes, have you any doubt that he knew that if she married without consent she would lose part of her income?" Answer—"I think he knew it, but I cannot say when he first became acquainted with it. He must have known it about the time of the hearing of the cause; whether before or after, I cannot say." It has been justly remarked upon the form of evidence thus given, that the witness says he "thinks" he knew it. In order to make out the best evidence which would be proper evidence, the witness ought to have said what it was that the defendant Coombes said or did to induce him to think this, because without that it was a mere thought of Mr. Lewis, and that is not properly evidence. But Mr. Lewis says, "I cannot say when he first became acquainted with it. He must have known it about the time of the hearing of the cause." He is speaking of conversations in the year 1856, six or seven years before the time when he gave his evidence. And such a statement so made is evidence upon the subject. Mr. Lewis was consulted with reference to the circumstances of the wife's property, and upon the subject generally, and being asked the question, "From your conversation with the defendant Coombes have you any doubt that he knew it?" (*i. e.* the clause of forfeiture) at a certain time, he replies, "I think he knew it."

The conclusion seems to be irresistible that, where knowledge was so highly probable and ignorance so very difficult—where one man states himself to have been ignorant and another man says he thinks the other knew it—the result must be that the condition of ignorance set up by Coombes cannot prevail. But there are other

1863.
 CHARLTON
 v.
 COOMBES.
 —
Judgment.

1863.
CHARLTON
v.
COOMBES.
—
Judgment.

passages in Mr. Lewis's evidence which all point to the same result, for he says that, as early as in November, 1854, "I saw the defendant Coombes with his uncle John, on the 29th of that month. Shortly before or after this interview I searched for the will of Thomas Alchin in Doctors' Commons. This interview, I have no doubt, was upon the subject of Mr. Andrus's affairs under that will." Then he says, "I saw the defendant Coombes again in October, 1855, with his uncle, regarding Mrs. Andrus's interest under the will. I am certain that, previous to this, the liability of any husband she might marry had been discussed." Was it possible that any professional man could have all this discussion about Mrs. Andrus's interest under the will, and yet keep the defendant Coombes ignorant of the condition that she would lose her property if she married? I cannot come to any other result than this—that the defendant Coombes was not ignorant, as he represents himself to have been, of the effect of the gift,

The result is that, as against Mrs. Andrus, the marriage was clearly a forfeiture of the property. All her right to the property went, and her use and enjoyment of the property after the date of the marriage was the use and enjoyment of property which she knew to be the property of other people; and of this I cannot believe that her husband was ignorant. This property was dealt with by the Court, Mrs. Andrus appearing in the character of a widow; and, under an order of the Court, a debt which the defendant Coombes was bound to pay, has been discharged out of property which, by the second marriage, had become the property of his wife's infant children. The result is, that I must consider the defendant Coombes as subject to all those liabilities which affected his wife, and affected himself after the marriage. The property must be accounted for, and justice must be done to her estate, which is here represented, not by

Coombes, but by one of his late wife's sons. The fraud on the Court on her part is glaring, and the order of the Court which directed a certain application of the money has ceased to have any operation. But, at the same time, so much of the fund as has been expended for the benefit of the children must be set off against what is due from the trust.

I am not satisfied with the conduct of the trustees. Charges of fraud have been made by the bill which are quite unnecessary.

[Mr. *Malins* was heard on the subject of costs.]

The VICE-CHANCELLOR:—I think justice will be done by giving to the defendants so much of the bill as refers to the improper charges (paragraphs 10 to 16). The order, therefore, will be that the taxing-master tax the costs of so much of the suit as is occasioned by the charges from paragraphs 10 to 16, and set them off against the costs payable to the plaintiff; tax the costs of the plaintiff of the rest of the suit, and let the defendant Coombes pay to the plaintiff so much as are not covered by the set-off. There must be an inquiry as to what (if anything) has been expended in the maintenance and education of the children; also an account of what would have become due in respect of the annuity of 50*l.* from Mrs. Andrus's marriage till her death; and the amounts would be deducted from the sum payable by the defendant.

1863.
CHARLTON
v.
COOMBES.
—
Judgment.

1863.

May 30.
June 1.

PELLEY v. BASCOMBE.

The executor, who was also named as devisee in a will, not attested so as pass real estate, entered into possession of the real estate, expended his own monies in improvements, and died intestate. His administratrix took a transfer to herself of a mortgage on the estate, and claimed it as assets under an alleged arrangement with the testator's widow, that her husband took the estate in discharge of a debt due from the testator. On a bill, filed by the testator's heiress, the Court held that the executor must account for the rents from the testator's death, with an allowance for permanent improvements.

Nanney v. Williams,
22 Beav.
452-489,
followed.

JOHN S. BASCOMBE, the testator, by his will, dated the 2nd August, 1833, gave and devised as follows:—"I leave to my beloved wife Harriet Bascombe all and everything I may die possessed of for her life, and at her death to be divided in equal portions between our two children Harriet and Susannah Marjory. I do appoint James Bascombe (my own brother) and John Langfield (my wife's own brother) as executors of my will, and trustees for my wife and children." The will was insufficiently attested to pass real estate, being attested by only two witnesses.

By an indenture dated the 27th September, 1817, the testator demised certain lands and hereditaments, called Affpuddle, of which he was seised in fee, to one Thomas Tapp for a term of 1000 years, to secure the sum of 200*l.* and interest thereon.

The testator died on the 8th August, 1833, leaving his two daughters Susannah M. Bascombe and Harriet Bascombe his co-heiresses at law. Susannah M. Bascombe died in 1834, never having been married. The other sister, Harriet Bascombe, the plaintiff, in 1843, being under twenty-one, married the plaintiff John Pelly. Immediately after the testator's death James Bascombe, one of the persons named as executors in the will, entered into the receipts of the rents and profits of the real estate, and expended a considerable amount of his own monies, alleged to be 780*l.*, in erecting a dwelling-house, five cottages, a malt-house, stable, barn, &c., on the property. He also kept down the interest on the mortgage. In February, 1858, James Bascombe died intestate.

In April, 1860, the plaintiff, who was the sole surviving daughter of the testator, filed a bill against Mary

Bascombe (the widow and administratrix of James Bascombe) and James Bascombe, his infant heir at law, alleging that James Bascombe had entered into possession of the devised estates on behalf of the plaintiff and her sister, and had clothed himself with a fiduciary character. The bill prayed that an account might be taken of the rents and profits, of the amount due for principal and interest on the mortgage, and also for an account of the rents and profits of the hereditaments &c. received by the said James Bascombe or Mary Bascombe, or which but for their wilful default they might have received. The bill prayed that on payment of what, if anything, should be found due in respect of the said mortgage, the said Mary Bascombe might be decreed to reconvey to the plaintiff, or as they should direct. The bill further prayed that in case any sum should be found due from the estate of the said James Bascombe deceased, or from the said Mary Bascombe, that the said Mary Bascombe might be decreed to pay such amount to the plaintiffs. In case the said Mary Bascombe did not admit assets, the bill prayed that the usual accounts might be taken.

Mary Bascombe, in her answer, alleged that James Bascombe entered into possession of the lands upon an arrangement with the widow of J. S. Bascombe that he should have the lands in satisfaction of a large balance which was due to him from J. S. Bascombe.

Thomas Bascombe, the infant heir of James Bascombe, in his answer claimed the benefit of the Statute of Limitations.

The original plaintiff Mary Bascombe died after the institution of the suit, and administration to her and her husband's estate was taken out by Henry Richards, against whom the suit was revived.

Mr. Malins and Mr. Sandys for the plaintiffs.—The only defence made to this suit is the Statute of Limi-

1863.
PELLEY
v.
BASCOMBE.
—
Statement.

Argument.

1803.
PELLY
 v.
 BASCOMBE.
 —
Argument.

tations, but it is clearly unavailing here, inasmuch as there was no adverse possession. In the first place, the plaintiff Mrs. Pelly was under disability ever since her father's death, first on the ground of infancy, and secondly of coverture. Secondly, there was no adverse possession, inasmuch as James Bascombe must be presumed to have entered into possession in a fiduciary character, and not as a stranger. He was the person named in the will as executor, and must have entered for the benefit of the family, or he could have had no right to enter at all. He kept down the interest on the mortgage, and did all those acts which, had the will been valid, it would have been his duty to have performed. If James Bascombe entered in a fiduciary character, the possession of his widow and administratrix must have been of a similar kind. It is true she took a transfer of the subsisting mortgage to herself, and had in that way acquired the character of a mortgagee in possession; and it is submitted that an account must be directed against her in that capacity; but during no period was the possession of herself or her husband adverse to the rights of the plaintiffs.

In *Thomas v. Thomas(a)*, a father had entered into possession of the lands of his infant children, and Vice-Chancellor Wood held that he must be presumed to have entered as their guardian and bailiff, so that the Statute of Limitations did not run against the children until they attained twenty-one. In the same case it was also held that, if the possession of the father was continued after the children attained twenty-one, such possession would be held to be continued in the same character, and the account would be directed, not from the filing of the bill, but from the entry. Substitute the word "uncle" for "father," and the present case was on all fours with that case.

(a) 2 K. & J. 79.

Mr. *Bacon* and Mr. *Joliffe* for the defendants, Henry Richards and Thomas Bascombe, the infant heir.

It was not disputed that the plaintiff and her husband were entitled to maintain this suit in respect of that moiety which descended upon the female plaintiff from her father, inasmuch as twenty years had not elapsed from her attaining twenty-one to the time of filing the bill.

But, as to that moiety which became vested in Susan Marjory on her father's death, it was submitted that the plaintiff's claim was barred by the Statute of Limitations. Susan Marjory died in 1834, and therefore the saving provided by 3 & 4 Wm. 4, c. 27, s. 16, began to run at her death and expired in 1844 (*a*): See *Sugden's Vendors and Purchasers* (*b*).

But, in fact, the statute began to run on the entry of James Bascombe in 1833. It was not necessary that his possession should have been adverse, because by the statute 3 & 4 Wm. 4, c. 27, secs. 2 and 3, the doctrine of non-adverse possession is done away with, except in cases provided by section 15 (*c*), and the time would run

1863.
 PELLY
 v.
 BASCOMBE.
 Argument.

(*a*) 3 & 4 Wm. 4, c. 27, s. 16.

"Provided always, and be it further enacted, that, if at the time at which the right of any person to make any entry or distress or bring any action to recover any land or rent shall have first accrued as aforesaid, such person shall have been under any of the disabilities hereinafter mentioned, that is say, to infancy, coverture, idiotcy, lunacy, unsoundness of mind, or absence beyond the seas, then such person, or the person claiming through him, may, notwithstanding the period of twenty years hereinbefore limited shall have expired, make

an entry or distress, or bring an action to recover such land or rent, at any time within ten years next, after the time at which the person to whom such right shall have first accrued as aforesaid shall have ceased to be under any such disability, or shall have died, which shall have first happened."

(*b*) 13 Ed. p. 400, c. 12, s. 3, pl. 15; 14 ed. p. 482, c. 12, s. 3, pl. 18.

(*c*) Cases where possession not adverse at time of passing the Act. See also *Scott v. Nizon*, 3 D. & W. 388, *Sugden's Real Property Statutes*, p. 78.

1868.
 PELLY
 v.
 BASCOMBE.
 —
 Argument.

from the entry, whatever might be the nature of the possession: *Nepean v. Knight*(a), and *Smith's Leading Cases*, 4th ed. 433. In *Thomas v. Thomas*, the person entering was the father, who was the natural guardian, but here James Bascombe could not be guardian, and must be assumed to have entered for his own benefit, and his paying interest on the mortgage made no difference. Lastly, James Bascombe was only a constructive trustee, and therefore was not deprived of the benefit of the statute of 3 & 4 Wm. 4, c. 27, s. 25.

In any case the account could only be directed from the filing of the bill: *Pulteney v. Warren*(b).

Judgment.
 —

THE VICE-CHANCELLOR:—

One effect of the statute 3 & 4 Wm. 4, c. 27, is materially to alter the law as to what is called adverse possession. The present state of the law is as follows:—The fact of a person receiving the rents of a property raises a presumption that he receives them in the character of owner; but this presumption may be rebutted in many ways. It may be rebutted by express evidence to the contrary; by evidence affecting the person who has entered into possession; or by evidence of the mode in which he has dealt with the rents. In *Thomas v. Thomas*, as I understand it, the Vice-Chancellor Wood had to consider the case of a father who had entered upon his infant son's lands, and in that case he held that the father had entered as guardian, though he there expressed an opinion that an infant could not, in all cases, treat a stranger as a bailiff for the purpose of avoiding the effect of the Statute of Limitations.

But the present case, where the person who entered was the uncle, the nearest male relative of the infant and the executor named in her father's will, and where

(a) 2 M. & W. 894.

(b) 6 Ves. 72—93.

he employed the rents in keeping down the interest on the mortgage, the case can hardly be considered as a case of an entry by a stranger. According to Littleton, and Lord Coke's Commentary, Co. Litt. 90 (a), an infant, even after attaining twenty-one, is entitled to make any stranger who has entered into possession account to him as a bailiff. Where possession is relied upon as a bar it ought to be a clear and absolute possession, with nothing equivocal. Here it is alleged that the executor entered into possession under an arrangement—an arrangement which neither the widow or the testator's children had any power to make. It would seem, therefore, that the executor did not enter as a stranger, but in such a manner that he must be treated as being in possession in a fiduciary character. He did nothing during his lifetime to alter the character of his possession. As his widow, after his death, paid off and took a transfer of the mortgage, that is a sufficient ground for making her account as a mortgagee in possession, and not like her husband, merely as a bailiff. The plaintiff's right to redeem has

1863.
PELLEY
v.
BASCOMBE.
Judgment.

(a) Section 124 of Littleton's Tenures, Tomlin's Edition, p. 161: "Also if other man (than guardian) who is not the next friend occupieth the lands or tenements of the heir, as guardian, in soccage, he shall be compelled to yield an account to the heir as well as if he had been next friend, but that is no plea for him, in the writ of account, to say that he is not the next friend, but he shall answer whether he occupieth the lands or tenements, as guardian, in soccage, or not. But *quære*, if after the heir hath accomplished the age of fourteen years, and the guardian, in soccage, continually

occupieth the lands until the heir comes of full age (*scil.*) of twenty-one years, whether the heir, at his full age, shall have an action of account against the guardian from the time that he occupied after the said fourteen years as guardian in soccage, or against him as against his bailiff."

In his Commentary, Sir E. Coke says, "This *quære* came not out of Littleton's quiver, for it is evident that after the age of fourteen years he shall be charged as bailiff, at any time when the heir will, either before his age of twenty-one or after.

1863.
 PELLY
 v.
 BASCOMBE.
 Judgment.

been fully established as against Thomas Bascombe, the infant heir.

I have had some doubts how far the accounts should go back, but I shall follow the decree in *Nanney v. Williams(a)*, and direct accounts from the death of Mrs. Pelley's father. It appears that the executor has laid out large sums in buildings and other improvements, therefore I shall direct an inquiry as to what he expended in his lifetime in permanent improvements or otherwise for the benefit of the infant. I have taken the form of this inquiry from *Umbleby v. Kirk(b)*, where the expenditure was as unauthorised as here. I shall allow Mary Bascombe's costs to be added to the mortgage-debt, and not give any costs against Thomas Bascombe.

May 8.

O'BRIEN v. LEWIS.

A solicitor who has acted for the plaintiff has a lien on costs under a decree for payment of costs to his client, after he has ceased to be solicitor in the cause, and although he had taken his client in execution for the costs.

THE plaintiff in this suit obtained a decree with costs, against the defendants to the suit. The present petitioners, Messrs. Lewis & Son, acted as his solicitors in that suit, but had subsequently been changed. The petitioners had sued the plaintiff for their costs, and obtained judgment, upon which a writ of *ca. sa.* had been issued, on which the plaintiff had been taken in execution, but nothing had been paid for costs. The former solicitors now presented a petition claiming a lien for their costs on the costs decreed to be paid in the suit.

(a) 22 Beav. 452, 460.

(b) C. P. Cooper, 1837, p. 254.

Mr. *Jessel* for the petitioners.

Every point raised by the respondents on this petition had been considered and decided in *Lloyd v. Mason* (a). That case decided that the solicitor's lien was not affected by an execution being issued against the client's person. The petition became necessary from the notice served by the plaintiff's present solicitor not to pay the costs to Messrs. Lewis & Son.

1863.
O'BRIEN
v.
LEWIS.
—
Argument.

Mr. *Greene* and Mr. *Cates* for the plaintiff.

First, there was no lien, inasmuch as there was no definite fund, but simply a decree for the costs. As defined by Baron Parke, "The lien which an attorney is said to have on a judgment (which is, perhaps, an incorrect expression) is a claim to the equitable interference of the Court to have that judgment held as a security for his debt:" *Barker v. St. Quentin* (b).

In *Lloyd v. Mansel* (c), the Court refused to direct the amount awarded for debt and costs to be paid to the solicitor.

In *Lloyd v. Mason*, it was an attachment and not a judgment, and this Court has always taken a distinction between the two.

[*Davis v. Bush* (d), *Jauralde v. Parker* (e), were also cited.]

See also *Roberts v. Ball* (f), and 1 & 2 Vic. c. 110, s. 16.]

Mr. *Brooksbank* appeared for the defendants in the suit, who were in the position of stakeholders who had received notices from both sides not to part with the fund. They claimed their costs. It was arranged that 10*l.* should be deducted for their costs.

(a) 4 Hare, 132; Ibid. 138.

(b) 12 M. & W. 441, 451.

(c) 23 L. J. N. S. Q. B. 110.

(d) 1 Young's Ex. 358.

(e) 30 L. J. N. S. Ex. 237.

(f) 3 Sm. & G. 168.

1863.
O'BRIEN
v.
LEWIS.
Judgment.

The VICE-CHANCELLOR:—

A solicitor's lien is a right which is founded on the rules of this Court and on the principles of common sense.

The argument that by taking the plaintiff's body in execution, the solicitors have abandoned their right and lost or destroyed the lien on the fund cannot prevail in this Court.

That doctrine, even if it prevailed at law, has never been adopted by this Court. The solicitors in this case seem to have done nothing to deprive themselves of the lien on the fund which they by their diligence have recovered.

The order must be that, after deducting 10*l.* for costs of the defendants to the suit, they the defendants, Messrs. Lewis & Lewis, pay the balance of the fund to the petitioners.

It is not a case in which the plaintiff ought to be ordered to pay costs.

May 28.

ELSEY v. ADAMS.

An *ex parte* injunction obtained on an affidavit, of which no office copy was in court at the time of making the motion, dissolved with costs.

MR. MALINS and Mr. Herbert Smith moved to dissolve an injunction which had been previously obtained *ex parte* on motion, without an office copy of the affidavit. The fact that no office copy had been in Court at the time of the application was proved, and indeed could not be denied. In *Jackson v. Cassidy*(a) the rule was laid down, and was also accurately stated in Daniel's Practice, 2nd ed. p. 1442.

(a) 10 Sim. 326.

The *Attorney-General v. Lewis* (a) was also cited.

1863.
ELSER
v.
ADAMS.

Mr. *Bacon* and Mr. *Hardy* appeared for the defendant.

The VICE-CHANCELLOR:—

Judgment.

This may seem a small matter, but it has always been the practice of the Court to require strict conformity with its rules in the matter of Special Injunctions. As there was no office copy of the affidavit in court when the injunction was moved for, it must be dissolved with costs.

TURNER v. BURKINSHAW.

June 26.

IN this case the plaintiff filed a bill against the defendant, alleging that in 1842 the defendant was appointed agent and manager of certain real estates of considerable value. The bill alleged that the defendant was accustomed to deliver to the plaintiff periodical accounts, in the following form:—"An account of rents and receipts received by J. J. Burkinshaw, belonging to the Rev. Charles Turner." The expenditure was classed under the head of "Disbursements." The bill referred specifically to several of the accounts.

The defendant, in a suit instituted against him as agent for an account, moved that certain accounts alleged in the bill to contain false entries might be produced, on an affidavit, that the vouchers were lost, and that he could not otherwise put in a sufficient answer.—The motion was refused with costs. *Taylor v. Heming*, 4 Beav. 235, considered.

The bill alleged, that on one particular occasion the defendant produced a private book or ledger which he had, in order to verify the account which had then been rendered; that on that occasion the plaintiff's agent,

(a) 8 Beav. 179.

1863.
TURNER
v.
BURKIN-
SHAW.
Statement.

employed by him to examine such account, ascertained that the defendant had made a false entry of 70*l.* in order to commit a fraud. The plaintiff's agent on that occasion requested the defendant to leave the ledger, in order to examine it, which the defendant refused to do, on the ground that it contained the accounts of other persons.

In 1861 the plaintiff ceased to employ the defendant, and shortly afterwards filed this bill. The interrogatories called on the defendant to specify precisely the nature, form, heading, and every particular of the accounts which the defendant had rendered to the plaintiff.

Argument.

Mr. Bacon and Mr. W. Forster, on behalf of the defendant, now moved for the production of these accounts, which the plaintiff admitted were in his possession. The defendant had not the means of answering the bill without the production of these accounts. His affidavit was as follows:—

“I have no copy, or duplicate, or draft of any of the accounts so rendered, nor of the entries contained in the said bankers' pass-books and cheque-books. Very many of the vouchers, and all memoranda from which such accounts were so prepared, have been mislaid, lost, or destroyed; and without having access to the plaintiff's bankers' pass-books and cheque-books, and to the general accounts so rendered by me to the plaintiff aforesaid, and now in his possession, I am wholly unable to defend myself in this suit, and to put in a sufficient answer. . . . I am desirous of giving the plaintiff the fullest and most complete discovery of all the matters referred to in the said bill, but it will be impossible for me to answer the interrogatories filed in this suit, or to give any satisfactory information or explanation of the plaintiff's affairs, without seeing the said accounts and the said bankers' pass and cheque-books.”

The Court would not require from a man what he had

not the power of performing, neither would it lay a trap to induce a man to commit perjury.

In *The Princess of Wales v. The Earl of Liverpool* (a), where the bill stated two promissory notes, on an affidavit by the defendant's executor that he had inspected the first note, and he believed in order that his answer might fully meet the case, that he ought before answering to have an inspection of the second note, it was ordered that the defendant should not be compelled to answer till a fortnight after the production of the second note.

In *Taylor v. Heming* (b), though Lord Langdale thought he could not order the inspection, he approved of the decision of the *Princess of Wales v. Lord Liverpool*, and thought the proper course was to extend the time for answering till the plaintiff had produced the documents.

[*Jones v. Lewis* (c), *Halliday v. Temple* (d), *Bate v. Bate* (e), were also cited.]

Mr. *Malins* and Mr. *Fielding Nalder*, for the plaintiff, were not called on.

The VICE-CHANCELLOR:—

This motion cannot be granted, because the case is entirely within the mischief pointed out in the case of *Halliday v. Temple*. The plaintiff in this case accuses the defendant, who had been his confidential agent, of having delivered accounts, in which he knew that there were not only mistakes but insertions of a fraudulent character. The defendant says that these documents are in the possession of the plaintiff, and the bill mentions a document which is in the possession of the defendant, and which will show that he committed a fraud. That document is mentioned in the 29th paragraph of the

1863.
TURNER
v.
BURKIN-
SHAW.
Argument.

Judgment.

(a) 1 Swanst. 114.

(d) 8 De G. M. & G. 96.

(b) 4 Beav. 235.

(e) 7 Beav. 528.

(c) 2 Sim. & St. 242.

1863.
 TURNER
 v.
 BURKIN-
 SHAW.
 Judgment.

bill. The plaintiff says that the ledger was produced, and the result was that a false entry was discovered; and that the defendant wilfully endeavoured to commit a fraud. The plaintiff wished to have that ledger left with him for examination, but the defendant refused to leave it. The defendant is the person who, having refused to leave that document in the plaintiff's possession, now asks that he may not be called upon to answer the bill until the plaintiff produces the accounts which the plaintiff says are false. Why does the defendant want this production? He says, in order that he may put in a full and complete answer. But, in truth, he wants them in order that he may shape his defence from the information which he may obtain from them. The motion must be refused with costs. I was rather surprised at the language attributed to Lord Langdale in *Taylor v. Heming*, which I think cannot be taken as the law of this Court. The law of the Court is as stated by Lord Langdale in *Bate v. Bate*, and probably was so intended to have been stated by him in *Taylor v. Heming*.

NOTE.—The order in *Jones v. Lewis*, was afterwards discharged by Lord Eldon, 4 Sim. 324. A similar application was also made before the Vice-Chancellor of England, July 12, 1833, and refused by him: *Milligan v. Mitchell*, 6 Sim. 186.

RUSSELL v. THE LONDON, CHATHAM, AND
DOVER RAILWAY COMPANY.

1853.

July 16.

THE defendants, the London, Chatham, and Dover Railway Company, moved to restrain two co-defendants from prosecuting an action which they had commenced against the company, or in the alternative that all proceedings might be stayed.

Motion by a defendant, before decree, to restrain a co-defendant from prosecuting an action, or to stay all proceedings in the suit on an affidavit that the relief sought by the bill and by the action was identical—Refused with costs.

By an indenture of settlement, dated the 18th May, 1854, and made between the defendant, John Scott Russell, of the first part; the defendant, Harriette Scott Russell, of the second part; and the defendants, George Wynne and Francis Fuller, of the third part; it was declared that a sum of 3000*l.* should be held by G. Wynne and F. Fuller upon certain trusts for the benefit of Mr. John Scott Russell and Harriette his wife, during their joint lives, and after the decease of the survivor upon such trusts for the child or children of the marriage as they should jointly appoint, and in default of appointment in trust for all the children in equal shares.

Under a power in the settlement the 3000*l.* was laid out upon the security of a second mortgage of a piece of land in the parishes of Beckenham and Lewisham, with a dwelling-house and buildings thereon, and by another settlement dated the 3rd February, 1855, and made between the same parties, the same land, dwelling-house, and buildings were settled by Mr. John Scott Russell upon trusts similar to those declared by the indenture of 1854, concerning the sum of 3000*l.* The settlement contained a power for the trustees with the consent of Mrs. Russell during her life notwithstanding coverture, and after her decease with the consent of Mr. Russell during his life, and after the death of the sur-

1863.
 RUSSELL
 v.
 THE LONDON,
 CHATHAM,
 AND
 DOVER
 RAILWAY.
 Statement.

vivor at the discretion of the trustees or trustee, to sell the premises.

The railway was to pass under the settled property through a tunnel, and, prior to the construction of that part of the line, by an indenture dated 20th December, 1861, between the mortgagor, the trustees, and Mr. and Mrs. Russell, the company were to pay for the rights of way, privileges, easements, land, hereditaments, and premises required by them, viz., 2500*l.* to the mortgagor, 1200*l.* to the trustees, and under a further agreement 300*l.* was to be paid to Mr. Scott Russell as compensation for permanent loss and inconvenience which he might sustain from the works. The conveyance was dated the 10th December, 1861.

In the course of the construction of the works considerable damage was done to the house and buildings in consequence of a subsidence of the earth; and this bill was accordingly filed by the children of Mr. and Mrs. Russell, of whom some were infants, against the company, their parents and the trustees being also defendants, alleging that the compensation proposed, viz. 3700*l.*, was inadequate to make good the damage, and praying that proper means might be taken for ascertaining the value of the property, and the amount of compensation. And secondly, that the trustees and the company, notwithstanding the agreement of the 20th May, 1861, and the conveyance of the 20th December, 1861, might be decreed to take such steps as might be necessary to ascertain the proper amount of the purchase-money and compensation, and that the company might be decreed to pay such amount when ascertained; and that in the meantime the company might be restrained from continuing in possession of the said hereditaments, &c., and from continuing the construction of the said tunnel or the said railway works.

Subsequently to the filing of the bill the trustees of the settlement brought an action against the company for

the damage done to the property. The suit had not yet come on to be heard.

Mr. *Malins*, Mr. *Cotton*, and Mr. *Meadows White*, for the motion.

It was clear that the object of the action and the suit were identical, or, at all events that suit included everything which could be effected in the action. Under these circumstances, it would be oppressive to allow the company, who were the real defendants in both proceedings, to be harassed by a double litigation.

In the case of *Edgumbe v. Carpenter (a)*, the Master of the Rolls, on the ground that the same solicitor was acting for the plaintiffs in both the suit and the action, stayed the action. That was really almost what existed here.

In *Wedderburn v. Wedderburn (b)*, at the instance of a defendant the Court restrained the plaintiff from proceeding in another court in respect of the same matter; that was, however, after decree. It was submitted, therefore, that the Court would stay the action.

The VICE-CHANCELLOR:—

There are objections to this motion which upon principle are insurmountable to a motion for an injunction made by one defendant against another defendant to restrain that co-defendant from proceeding in an action at law where the application is made before decree. After a decree all parties are actors, and the Court proceeds on an ascertained view as to the rights of the parties. But before decree, and upon an interlocutory application by a defendant, I have never heard of the writ of injunction being issued. In *Mitford on Pleading (c)*, 5th ed. p. 55, the rule on this point is stated in a note referring to the case of *Savory v. Dyer (d)*: "It is a

1863.
RUSSELL
v.
THE LONDON,
CHATHAM,
AND
DOVER
RAILWAY.
Argument.

Judgment.

(a) 1 Beav. 171.

(b) 2 Beav. 203.

VOL. IV.

(c) Pp. 585, 586.

(d) Amb. 139.

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1863.
 RUSSELL
 v.
 THE LONDON,
 CHATHAM,
 AND
 DOVER
 RAILWAY.
 —
Judgment.

general rule that the writ of injunction will not be granted unless prayed for by a bill which is already filed." But the note has this qualification — "or under special circumstances, which (the bill) the party applying undertakes to file forthwith." That exception is founded on the decision in *M'Namara v. Arthur* (a); but in the case of *M'Namara v. Arthur* the injunction was applied for against the plaintiff on a representation that a cross bill would immediately be filed. There is no authority for granting a writ of injunction on the application of one defendant against another, on an interlocutory proceeding before the cause is brought to a hearing and the decree is made.

Lord Eldon, in the case of *Wright v. Athyns* (b), says, "Generally, if the bill does not pray an injunction, the plaintiff cannot move for an injunction under the prayer for general relief; but if after a decree for an account under a bill for foreclosure the mortgagor attempted to cut timber, the Court would enjoin him, though there was no prayer for that." Of course there could be no prayer where one defendant was applying against another under the circumstances referred to by Lord Eldon.

I should not have thought it necessary to refer to these authorities but for the arguments which have been urged at the bar. The plaintiffs are persons, some of them infants, filing a bill in this court against their own trustees, who have entered into an agreement for the sale of their land to the defendants, a railway company. The plaintiffs complain that that agreement was made wholly *ultra vires*, and was improper; and they ask the Court to direct that, if the land is to be sold, it may be sold in a proper way, and that, if compensation is to be made, it may be made in a proper way. The bill further complains that after this agreement by the defen-

(a) 2 Ball & B. 349.

(b) 1 Ves. & B. 313.

dants the trustees, to sell the plaintiff's land, their co-defendants the railway company, against whom the plaintiffs also complain, have under that agreement been proceeding in such a way as to inflict certain special injury on the property, in which the plaintiffs are interested, by the improper construction of the works, so as to do damage of a very serious kind. It is plain that, whatever remedy the plaintiffs may be entitled to in respect of an injury of that kind, it is a separate consideration, and apart from the general question raised by the bill, in which they complain that the trustees have made an improper agreement for the sale of their land.

The first thing which the motion asks is an injunction to prevent the action at law from going on, but the alternative is, that this action should go on and that the suit should stop. Looking at the nature of the action, it certainly seems to be one in which damages may be recovered for the special injury done by the improper construction of the works which are mentioned in the plaintiff's bill; and I can see no reason why an action of this kind may not with perfect convenience proceed, inasmuch as the plaintiffs are complaining against both parties, the trustees and the railway company.

The motion must be refused with costs, but without prejudice to any case that may be made by a bill for an injunction.

1863.
 RUSSELL
 v.
 THE LONDON,
 CHATHAM,
 AND
 DOVER
 RAILWAY.
 —
Judgment.

1863.

July 16, 17.
18, & 20.

STRANGE v. FOOKS.

A surety is entitled to the benefit of the securities in the hands of the creditor. Therefore, where a creditor, whose debt was secured by the bond of the debtor and his surety as well as by a mortgage of the equitable life interest of the debtor and his wife in certain real estate and policies of assurance, assigned his debt, without notice by himself or the assignee, to the trustees of the settlement, who sold under a power—*Held*, that the surety was discharged to the amount of the security lost.

Where acquiescence is relied on, it must be shown that the person acquiescing was aware of the thing in which he acquiesced, and of the effect of such acquiescence.

Wheatley v. Baston, 7 De G. M. & G. 261 & 271, considered.

THIS bill was filed by Susannah Strange, the administratrix of Simon Strange, and it prayed for a declaration that the estate of Simon Strange was not liable in respect of a bond executed by him and for an injunction. On the occasion of the marriage of the defendants James Strange and Sarah Young in the year 1839, by a settlement of that date, certain freehold hereditaments belonging to the intended wife, being a moiety of an estate called Ridouts, at Holwell, Somerset, were conveyed to William Caines and Isaac Clifford and their heirs on trust to pay the rents and profits to the wife during the joint lives of husband and wife to her separate use, then to the survivor of the husband and wife for life, and afterwards upon certain trusts for the benefit of the issue of the marriage.

On the 19th January, 1852, James Strange the husband as principal, and his brother Simon Strange as surety, entered into a bond with the defendant Thomas Fooks, in the sum of 1000*l.*, conditioned to be void on payment by James Strange and Simon Strange, or either of them, their or either of their executors or administrators, to Thomas Fooks of the sum of 1000*l.* with interest at 5 per cent. on the 19th July then next, which sum was as was recited in the bond, the principal sum and interest which was secured to the said Thomas Fooks in and by a certain indenture of mortgage.

On the same day by a deed, recited as a deed of even date made between James Strange and Sarah his wife of the one part, and the said Thomas Fooks of the other part, the life estates in the hereditaments which were the subject of the settlement, together with two policies of assurance for 500*l.* each, which had been about a month before effected on the life of James Strange and on that

of his wife respectively, were conveyed and assigned to Thomas Fooks, upon trust, if default should be made in the payment of the 1000*l.* and interest on the 19th July, 1852, of his own authority, and without any further consent or concurrence of James Strange and his wife, to sell the premises, and out of the proceeds repay himself the principal money and interest. James Strange in a distinct covenant covenanted to pay the same.

1863.
STRANGE
v.
FOOKS.
Statement.

Simon Strange died in August, 1855, intestate, leaving the plaintiff Susannah Strange his widow, who obtained letters of administration of his estate.

By an indenture dated the 19th October, 1855, Thomas Fooks by deed assigned to the defendant John Hole the debt of 1000*l.* and interest, together with the benefit of all securities for the same.

The trustees of the settlement of 1835, under the power in the settlement, had sold the moiety of the settled property, and distributed the proceeds amongst the parties interested under the trusts of the settlement. They had received neither from the mortgagee Fooks, nor from his assignee Mr. Slade, a solicitor of Yeovil, who with Mr. Vining had been Simon Strange's solicitor, information of the existence of the bond, or of the deed of even date.

On the 4th November, 1861, Hole, in T. Fooks's name, commenced an action on the bond against the plaintiff; and in the following December this bill was filed to restrain the action. The plaintiff, in January last, undertaking to give judgment in the action, as administratrix, to be dealt with as the Court should direct, the motion for an injunction was ordered to stand over to the hearing of the cause.

The plaintiff charged that if the 1000*l.* secured by the bond was not paid in July, 1852, when it became due, Thomas Fooks was guilty of a breach of trust in not realising the money out of the rents and profits of the

1863.
 {
 STRANGE
 v.
 FOOKS.
 —
Statement.

settled estate, which were sufficient to satisfy the claim, or if necessary by sale; that upon the assignment to Hole it became his duty to enforce the payment, and that their neglect, or the neglect of one of them, to carry into execution the trusts of the deed of January, 1852, had in equity discharged the estate of Simon Strange from all liability in respect thereof.

The bill further alleged that the defendant Hole had notice of the death of Simon Strange, but that neither he nor Fooks gave any notice to the plaintiff, the administratrix, of the existence of the bond; and she was, consequently, unable to realise the security. The bill further charged, that by the neglect of the defendant to give notice of the bond and of the assignment to the trustees of the settlement of 1835 the plaintiff had become deprived of the benefit of the indemnity to her husband's estate, and that thereby the security had become lost.

The bill was amended, and further charged that the defendant Hole in 1855 had constructive notice through Mr. Slade, their common solicitor, of the breach of trust which had been already committed by Fooks in not realising the security.

The bill prayed for a declaration that the plaintiff and the estate of her late husband were discharged from all liability to the defendants under the bond.

The defendants in their answer denied that they were under any obligation to give such notice to the trustees charged in the bill.

Argument.
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Mr. *Malins* and Mr. *Cracknall*, for the plaintiff.

The rule of this Court, established by a long series of authorities was, that where a creditor, either by doing what he ought not to do or omitting what he was bound to do, damages or destroys a security on which the surety was entitled to rely, the creditor lost his remedy against the surety. In the case of *Watson v. Alcock* (a), it was

(a) 1 S. & G. 319.

1863.
STRANGE
v.
FOOKS.
—
Argument

held that the omission by the creditor to file a warrant of attorney discharged the surety. In that case his Honour said, "it was of the essence of the contract for suretyship, that the surety should have the benefit of the warrant of attorney." That case came before the Lords Justices on appeal, and they affirmed his Honour's decision(a).

In *Straton v. Rastall*(b), it was held that where an annuity bond granted by two became void by the neglect of the grantee, in not registering a memorial under the statute, he cannot receive back any part of the consideration-money from the one known to be the only surety who had received no part of it, though both joined in a receipt. On an argument on an equitable plea, in *Watts v. Shuttleworth*(c), it was laid down that in equity, on a contract of suretyship, if the person guaranteed does any act injurious to the surety, or inconsistent with his rights, or if he omits to do any act which his duty enjoins him to do, and the omission proves injurious to the surety, the surety will be discharged. This doctrine was affirmed on appeal by the Exchequer Chamber(d). In *Capel v. Butler*(e) the marginal note was in these terms:—"If by the neglect of the creditor the benefit of some of the securities for the debt is lost, the surety is *pro tanto* discharged." A surety is entitled to the benefit of all the securities taken by the creditor, whether he has notice of them or not: *Pearl v. Deacon*(f)* See also *Law v. The East India Company*(g).

Mr. Greene and Mr. Locock Webb, for the defendants.

The assignments of 1852 and 1854 were perfect and complete, and required nothing further to be done: *Voyle v. Hughes*(h): and if the assignments were com-

(a) 4 De G. M. & G. 242.

(b) 2 T. R. 366.

(c) 5 H. & N. 235.

(d) 7 H. & N. 353.

(e) 2 S. & S 457

(f) 24 Beav. 186.

(g) 4 Ves. 824—833.

(h) 2 Sma. & G. 18.

1863.
 STRANGE
 v.
 FOOKS.
 —
Argument.

pleted, no notice was necessary, and the rights of the creditor were not affected by the omission to give notice.

In *Wheatly v. Bastow* (a), it was held that the omission to obtain a stop order, an equitable assignment of the debt having been made, did not discharge the surety, neither would delay by the creditor in suing for the debt discharge the surety. [*Eyre v. Everett* (b), *Gordon v. Calvert* (c), were also cited. See *Ex parte Mure* (d).]

Mr. C. Hall appeared for Mr. and Mrs. Strange.

Judgment.
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The VICE-CHANCELLOR:—

It is perfectly established in this Court that, if through any neglect on the part of a creditor a security to the benefit of which a surety is entitled is lost, or is not properly perfected, the surety is discharged.

The first transaction here relied on is that by means of which Simon Strange, whose representative the plaintiff is, became surety for his brother James, to a mortgagee who had advanced money upon the security of a mortgage of certain real property in which James Strange had an equitable interest.

Simon, the surety, had a right to the benefit of the mortgage security, and the right to have the mortgage security dealt with by Fooks, the mortgagee, in such a manner as that the benefit of it should not be lost. As it has turned out, it appears that the benefit of the security was, in fact, lost by the neglect of the creditor to give notice of the settlement of the claim to the trustees, who held the property upon which the security was given.

An attempt has been made to show that Simon Strange acquiesced in the non-performance of that act which was necessary to perfect the security. But the evidence does not, in my opinion, prove any such acquies-

(a) 7 De G. M. & G. 261—275.

(b) 2 Russ. 381.

(c) 4 Russ. 581.

(d) 2 Cox, 63.

cence. The solicitors who give this evidence, especially Mr. Vining, were the solicitors of Simon Strange in this transaction, and also the solicitors of James Strange and of Fooks the mortgagee. Their duty, especially to Simon Strange and Fooks, was to have given notice to the trustees of the settlement, and their neglect in not so doing has occasioned the loss which has been the occasion of this suit. But they say that Simon Strange acquiesced in no notice being given to the trustees of the settlement. The evidence, indeed, shows that James Strange, who had an obvious interest in not allowing the security to be known, was anxious that the trustees of the settlement should not know of the security. But there is no sufficient evidence that Simon Strange concurred in neglecting to do what it was the duty of Mr. Slade and Mr. Vining to tell him he ought to have done. It was the duty of the solicitor to tell the surety that notice ought not to be dispensed with; but the evidence goes to this—not that the surety consented to waive the notice, but that the solicitor consented. This was the conduct of the solicitor acting for the mortgagor.

In cases of this kind, where acquiescence is relied upon, it is essential that the person who acquiesces must know exactly the nature of the thing to which his acquiescence is supposed to be given. He must know that, and he must know also the effect of his acquiescence. In this case the solicitor who, acting on behalf of all these parties, acquiesced in this arrangement, betrayed his duty to the mortgagee and surety in not telling them what the consequences were. In his second affidavit Mr. Vining tries to make the case stronger. He says, "James Strange was apprehensive that if notice was served" the whole transaction would be known to the trustee. "Simon Strange concurred in thinking that it would be prejudicial to his brother, by reason of his position with the Caines and Dunning families, and joined with his

1863.
STRANGE
v.
FOOKS.
Judgment.

1863.

STRANGE

v.

FOOKS.

Judgment.

brother in requesting me not to serve any notice of the mortgage on Mr. Caines, and it was solely in consequence of such request that no notice was given to him of the mortgage."

Now, if Simon did that, it must be shown, in order to have the effect of acquiescence in a case of this kind, that he understood what he was about, and that he understood the effect of this acquiescence. Therefore, if the only question before the Court is as to the nature of the transaction, and how far the conduct of Fooks had discharged Simon, I cannot, upon this evidence, hold that the assets of Simon are now liable on this bond.

Whatever may be thought of the original transaction, this case must be decided on the conduct of Hole, to whom the mortgage was assigned. Mr. Fooks, who never had his security perfected, and upon whom that duty lay if he intended to hold the surety liable upon the bond, assigned the security and the bond in the year 1855 (more than three years afterwards) to Hole.

I do not enter into the preliminary transactions, in which an equal negligence and improper course of conduct is proved; but it is proved that the person who took an assignment of this mortgage was bound, when he took the assignment of the bond of suretyship, if he intended to have the benefit of it, to see that everything was perfected which was necessary to keep alive his right. He was bound to know that negligence on his part as to the security to the benefit of which the surety was entitled, or any neglect on his part in not perfecting the security, or anything that occasioned the loss of the security, must release the surety. Acting under the advice of the same solicitor, Mr. Hole did nothing. There is no evidence that he had knowledge that notice had been given, or that he considered the notice to be in the least degree of importance. It seems to me that this case comes within the general doctrine of the

Court that, a surety being entitled to the benefit of every security, where a security is lost through the negligence of the principal creditor by his not having had it perfected in the proper way, the surety is released to that extent.

1863.
STRANGE
v.
FOOKS.
Judgment.

In the case of *Wheatley v. Bastow*, it was decided that if there has been an assignment by a creditor of the security and of the suretyship, and a fraud occurs, all parties must bear the loss, and the surety is not discharged. The Lords Justices in that case, which is a remarkable one, seem to have rested their decision entirely upon this:— That there was no bond of suretyship, but only an assignment by a brother, and by a sister who was no debtor, of property to which they were entitled in two moieties, in order to secure a debt due by the brother; and there was, therefore, a question only between the assignor and assignee. This is not the case here. In that case the surety was not held to be discharged, and the Court held that the loss was occasioned by the fraud of the solicitor. In the present instance I think the plaintiff's case has been established. None of the subordinate points seem to me to be of any importance—as that Joseph Strange was a trustee and that he had notice—because the fact is that Joseph Strange is not proved to have been appointed a trustee of the settlement—and that if there had been that proper notice, the loss would not have occurred. Another subordinate point seems to me to be equally incapable of being maintained, namely, that the mortgagee was not bound to give notice, because, as between the assignor and assignee, there was a complete transfer of interest. That does not prevent a fraud being committed by the assignor, and if a fraud is committed the principle of *Voyle v. Hughes*, and the doctrine referred to is not applicable to the case.

There must be a decree that the estate of Simon Strange is entitled to the benefit of the security; and the benefit of

1863.
 {
 STRANGE
 v.
 FOOKS.
 —
Judgment.

the security appearing to have been lost through the negligence of the defendants Fooks and Hole, let an inquiry be directed what loss had been occasioned to the estate of Simon Strange by the loss of the security; the plaintiff to have the costs of the suit up to the hearing against Fooks and Hole.

Dec. 19.

WILSON v. ROUND.

Where a solicitor had obtained for a client a foreclosure decree (who had subsequently died, and a decree for administration of his estate had been made) the Court, under the 28th section of the 23 & 24 Vic. c. 127, made a charging order for the costs of the suit against the real estate of the client.

MR. EDDIS appeared for the petitioner, a solicitor, who asked under the 28th section of the Attorneys and Solicitors Act, 1860 (23 & 24 Vic. c. 127, s. 28), that it might be declared that his bill of costs might be charged upon certain real estate, mortgaged to the client, as to which a foreclosure decree had been made in favour of the client of the petitioner. Some of the costs sought to be charged were those of actions of ejectment and of indictments preferred against certain persons who had entered forcibly upon the mortgaged property. The client had died, and a creditor's suit had been instituted for the administration of his estate, in which his real estates had been ordered to be sold, and the proceeds, after paying incumbrances, applied in payment of his debts.

Argument.

Mr. De Gez, for the executors of the deceased client.—After the decree in the creditor's suit the order asked for cannot be made. At all events such order should be confined to the costs of the foreclosure suit.

Judgment.

THE VICE-CHANCELLOR.—The costs are a charge; but the charging order can only include the taxed costs, charges, and expenses of or in reference to the foreclosure suit. Order that the amount of such acts be raised by sale or mortgage of the property; with liberty to apply.

1863.

DAVIES v. DAVIES.

June 23 & 24.

IN April, 1859, the plaintiff Jane Davies, a single woman, about twenty-two years of age, became entitled as residuary legatee under the will of Sarah Davies to about 210*l.* in cash, 400*l.* standing to the account of Sarah Davies in the National Provincial Bank at Aberystwith, and two sums of 305*l.* and 375*l.* stock, standing in the name of Sarah Davies, or of her late husband.

Shortly after Thomas Davies effected a purchase of the leasehold house in which he was living, in his own name, with 200*l.*, part of the said legacy.

On the 30th May, 1859, the sum of 400*l.* was transferred to the account of Thomas Davies. The plaintiff alleged that shortly after the purchase of the house the plaintiff's father suggested to her that it would be expedient for her to transfer the money and stock bequeathed to her into his name as a trustee. The plaintiff declined, but a few days afterwards, she having been advised to leave Aberystwith for the benefit of her health, her father told her she had better go to the National Provincial Bank to draw some money for her travelling expenses; and having done so, he left the house and shortly afterwards returned, saying, "Mr. Jones [the cashier at bank who had received the dividends on the stock] will be in the bank at two o'clock, and you must go up and sign some papers at that time to change the stock from the name of Sarah Davies before he can get the interest for you." By these representations the plaintiff was induced to go with her father to the bank, for the purpose, as she believed, of executing documents to enable Mr.

Gift by a daughter of a large part of her property to her father set aside with costs, it appearing that it was made shortly after attaining twenty-one, and while the father was acting as her guardian, and was regarded with implicit confidence as the sole relative capable of managing her affairs.

Where a gift is impeached on the ground of undue influence, in order to sustain the gift the Court requires the clearest and most unequivocal evidence that the transaction was fully understood by and was the voluntary and deliberate act of the donor.

Hatch v. Hatch, 9 Ves. 296, considered.

1863.
DAVIES
v.
DAVIES.
—
Statement.

Jones to receive and pay to her the dividends on the stock. At the bank Mr. Jones endeavoured to prevail on her to transfer the moneys into the name of her father, but the plaintiff positively refused to divest herself of her property in the manner proposed. Mr. Jones afterwards informed the plaintiff that she must, in order to transfer the said moneys into her own name, sign some eight or ten documents which were placed before her by him, for, as she believed, that purpose. The plaintiff, who was on the point of leaving Aberystwith by the steamer, had not time to read all, but she read the first three or four papers which were placed before her, and which purported to be transfers of stock into her own name; and concluding that the others were to the same effect, she signed them all without having the purport or effect of them explained to her. After the documents were all signed Mr. Jones took up one of them and said, "By this paper you have signed the 400*l.* that is in the bank for your father," and he delivered over the paper to Thomas Davies.

The plaintiff was shortly after married to her present husband, and the bill alleged that prior to her marriage she executed a settlement, by which her property was settled upon herself and her husband during their joint lives, and, after the decease of either, remainder upon the children of the marriage. The plaintiff alleged that this settlement was not in conformity with her instructions, inasmuch as it placed the income of the property under the control of her husband during their joint lives, and made no provision for her surviving him.

Joseph Davies had assigned his interest in the property to trustees for the benefit of his creditors, who were made defendants to the suit.

The bill prayed that this settlement might be rectified.

The bill also prayed that it might be decreed that the plaintiff was entitled to the said leasehold house purchased

with the said sum of 200*l.*, and also the sum of 400*l.*, or certain houses which the said Thomas Davies had purchased with such moneys. •

1868.
DAVIES
v.
DAVIES.
—
Argument.

Mr. *Malins* and Mr. *O. Morgan* for the plaintiff.

This was a transaction between parent and child, and could not be sustained in this Court. In *Archer v. Hudson* (a), a niece, two months after she came of age, and after her guardians had fully accounted to her, entered into a voluntary security for her uncle, by whom she had been brought up, but the Court set it aside. In *Wright v. Vanderplank* (b), and in *Hoghton v. Hoghton* (c), where all the authorities were considered, the same doctrine was laid down. See also *Baker v. Bradly* (d).

Mr. *Bacon* and Mr. *Piggott*, on behalf of the defendants, contended that this case was not within the principle of the authorities, and that the gift was valid.

The VICE-CHANCELLOR :—

Judgment.
—

The main question is as to the validity of the transaction by which the defendant Thomas Davies obtained from his daughter the sum of 400*l.*, which was deposited in a bank at interest at the time of the transaction, and to which he claims to be entitled as a gift from his daughter.

This Court always inclines to hold that a gift is invalid where it is made to a person who has great power or influence over the donor, unless it be shown in the clearest and most unequivocal manner that the influence did not subsist at the time of the gift. This rule is established upon grounds of public policy which have been repeatedly

(a) 7 Beav. 351.

(c) 15 Beav. 278.

(b) 8 De G. M. & G. 133.

(d) 7 De G. M. & G. 597.

1863.
DAVIES
v.
DAVIES.
—
Judgment.

explained. Freedom from the pressure of influence may be shown in many ways: it may be shown that, from a laudable motive, there had been a long-continued intention often expressed to make a gift; or that the donor, perfectly understanding the nature of the transaction, had resolved, perhaps by the advice of unbiassed friends, to make the gift. In all cases where gifts have been supported it has been shown that nothing equivocal remained in reference to the existence of the influence.

In this case the father himself states the circumstances under which he stood in relation to his daughter, and those circumstances show that the influence arising from the relation of parent and child was subsisting in full force at the time of the transaction. The relation of guardian and ward, and the relation of parent and child, are here exhibited in their most important points.

The father, in his answer, distinctly states that in the months of April, May, and June, 1859, and until the marriage of the plaintiff, he, being her father, assumed with her consent the guardianship and direction of her affairs and property, and that she looked up to him with implicit confidence as the only relative she had who was of an age or in a position to protect and assist her in the management thereof. But he denies that by the means in the bill mentioned, or by any other means, or in fact, he acquired or exercised a complete influence and control over her. It is, however, impossible to state more strongly and distinctly the existence of the influence arising from the relation, and its existence at the very time when the transaction was entered into than he does himself. The defendant states that the plaintiff implicitly confided in his assuming the direction of the management of her property. But it appears further that, at the very time of this alleged gift of the 400*l.* being made, the defendant had been dealing with the sum of 200*l.* in a way which, taking his own account of it, cannot be considered as

showing that he had discharged the duty which he undertook to discharge towards his child. He said that he considered the 200*l.* to be his wife's property, though he knew that his daughter claimed it; and he also states, in various paragraphs in his answer which relate to his conduct in reference to this sum, that his daughter considered the money was her own; that she objected to a receipt for it being drawn up in his name; and that she wished the property, which she knew had been purchased with the money, to be assigned to her in her own name. All that is stated by the defendant in his answer. With respect to the conveyance of the property, he says that his solicitor had, by his instructions, when he paid the purchase-money to the vendor, prepared a draft assignment of the said leasehold house and premises, and of a small tenement adjoining thereto; and that such house, tenement, and premises were, by his instructions, expressed in the draft to be assigned to the plaintiff for the residue of the term of years subsisting therein; but, considering that the house had been purchased with his wife's money, he instructed his solicitor to alter such draft, and the solicitor, by his instructions, altered the draft by inserting his name in the place of that of his daughter as the purchaser under the deed, and that the draft was altered without any instructions from the plaintiff, and, he believed, without her knowledge or consent.

As to what took place on the 30th May—the day upon which the gift of 400*l.* was made—there is a conflict of evidence in the accounts given by the daughter, by the father, and by Mr. Jones, who prepared the instrument which is called a gift. No two of them concur in their testimony respecting this transaction. The father says his daughter expressed a wish to give part of her property to him and her mother; and what is a very strange thing to state as having been part of the conversation

1863.
 DAVIES
 v.
 DAVIES,
 —
Judgment.

1883.
DAVIES
v.
DAVIES.
—
Judgment.

upon the subject, that his daughter asked him if he would be satisfied if she gave him 400*l*. To ask whether the father would be satisfied with 400*l*. shows a state of mind not free from influence and control to the extent which is necessary in cases of this kind.

As to what took place on the 30th May, at the bank, when he went to see Mr. Jones, the manager of the bank, respecting the transfer, there is contradictory evidence. Mr. Jones's account is, that on the morning of the 30th May the father and daughter came together to his private residence, and that the daughter expressed an intention of making a gift of 400*l*. and said she had come to ask if it could be done. The father states the same thing, and that that was the object of his going to the bank. The daughter states that her father went to the bank alone previously. The father states that he did not, but that they went together, taking with them the deposit receipts, and that Mr. Jones gave instructions as to how the transaction could be effectually carried out. This is a small matter ; but in the evidence of the daughter she states that she originally took the receipts and placed them upon her father's desk, and, after having had her attention called to the evidence of the other witnesses, she denies that she took the two deposit receipts to the bank or handed them over to Mr. Jones, but she says that she left them in the desk at her father's house, and cannot state by whom they were taken to the bank. It seems beyond a doubt that at the bank she was told that she ought to sign her name in order (as Mr. Jones stated) to make an effectual gift ; but her own statement is wholly inconsistent with that. She says she was told by her father that, as executrix, in order to obtain the interest on the moneys, it would be necessary that the name in which they stood should be changed, and that the moneys should be transferred into another name. Looking at all the circumstances, and the evidence of the parties, it seems to me that there

1863.
DAVIES
v.
DAVIES.
—
Judgment.

is a natural, coherent, and consistent story told on the part of the daughter. The plaintiff states that when Mr. Jones told her she had signed away the 400*l.* to her father she was quite startled, and that she believed that what had been done could not be undone. The matter was, therefore, allowed to rest. It is impossible to doubt that at the time when the transaction of this gift took place the influence of the father was in full force, and unless it can be proved that all influence was removed the gift is vitiated.

The evidence in order to support the gift should show, in the clearest and most unequivocal manner, that the transaction was well understood by and was the deliberate and voluntary act of the person who made the gift. That evidence is wanting in this case, and consequently the gift is one which cannot be sustained.

I cannot leave the case without referring to the law as stated by Lord Eldon in the case of *Hatch v. Hatch* (a). Lord Eldon, upon a question in reference to a case of guardian and ward, and not of parent and child, uses these words: "This case proves the wisdom of the Court in saying it is almost impossible, in the course of the connection of guardian and ward, attorney and client, trustee and *cestui que trust*, that a transaction shall stand purporting to be bounty for the execution of antecedent duty. There may not be a more moral act, one that would do more credit to a young man beginning the world, or afford a better omen for the future, than if, a trustee having done his duty, the *cestui que trust*, taking it into his fair, serious, and well-informed consideration, were to do an act of bounty like this. But the Court cannot permit it except quite satisfied that the act is of that nature, for the reason often given; and in recollecting that in discussing whether it is an act of rational consideration, an act of pure volition uninfluenced, that inquiry is so easily baffled

(a) 9 Ves, 292.

1863.
DAVIES
v.
DAVIES.

Judgment.

in a court of justice that, instead of the spontaneous act of a friend uninfluenced, it may be the impulse of a mind misled by undue kindness or forced by oppression."

The doctrine of the Court cannot be more clearly stated than in that case. There is wanting in this case sufficient evidence to show the removal of influence on the part of the father, and that circumstance alone vitiates the gift.

Declare that the gifts of the sums of 200*l.* and 400*l.* to the defendant Thomas Davies are invalid, and that he is bound to repay those sums to the trustees of the settlement; that the settlement be rectified as prayed, by conveying the property of the plaintiff to trustees in trust for her separate use for her life, without power of anticipation, with immediate remainder for her children; that the defendant Thomas Davies do pay all costs of the suit, excepting so far as they relate to the rectification of the settlement; and that he account for the rents received by him, and be allowed 40*l.* for improvements.

1863.

WROE v. SEED.

July 15.

THIS bill was filed on the 30th July, 1861, by some of the residuary legatees under the will of Thomas Wroe dated in 1849. The testator made numerous specific gifts of real estate, and devised all other his real estate and bequeathed all his personal estate to Edward Seed and Peter Wroe, their executors, administrators, and assigns, upon trust "as soon as they conveniently could after his decease, to sell and convert into money all such parts of his personal estate as should not consist of money or securities for money, and all his real estate; but he declared that notwithstanding the said trusts and conversion it should be lawful for his trustees or trustee to postpone the sale or conversion of his said real or personal estates for such period not exceeding five years from the time of his decease as such trustees or trustee should deem expedient. And until such sale and conversion the income should be paid to the person who would be entitled to the moneys as if such conversion had actually taken place.

The testator directed that as to the proceeds of the sale after payment of the debts, &c., after providing for the purchase of an annuity, and for payment of certain legacies, the executors should divide the residue as follows:— One seventeenth among the children of the testator's nephew John Wroe, and the remaining sixteen seventeenths among the testator's other nephews and nieces except John Wroe.

The testator died in June, 1856. From the beginning of 1860 the plaintiffs made numerous applications for an account and payment of the shares, but without success.

On the 1st June, 1861, the plaintiffs' solicitors sent a letter addressed to both defendants giving them notice

Executors and devisees in trust to sell, having an option of postponing the sale for five years were directed in such case to pay the income to the tenant for life. At the end of five years, they had paid no legacies, rendered no account, though frequently requested so to do, nor dealt with the estate, but claimed remuneration for their services— Ordered to pay the costs of a suit, to administer the trusts of the will.

1863.
WROE
v.
SEED.
Statement.

that, unless they had the accounts they required within one week, or a written assurance that such accounts should be delivered within one week after such assurance, they should give instructions to prepare a bill, and should ask the Court to compel the defendants personally to pay the costs of the suit. To this no answer was returned, and on the 4th July the solicitors wrote again stating that they had received instructions from their clients to commence proceedings, and that they wrote that letter for the purpose of affording to the defendants a further opportunity of complying with the wishes of the parties and with the intention thereafter of throwing upon them each, personally, the costs of the suit rendered imperative by their refusal and neglect to render proper accounts. No reply was returned to this letter.

The bill was filed on the 30th July, 1861, and a decree made directing the usual inquiries and accounts.

By his certificate the chief clerk found that the executors had received personal estate, not specifically bequeathed, to the amount of 25,657*l.* 10*s.* 5*d.*, and had paid and were entitled to be allowed sums to the amount of 23,813*l.* 15*s.* 9*d.*, leaving a balance due from them of 1843*l.* 14*s.* 8*d.*

The items disallowed amounted together to 1177*l.* 10*s.* 11*d.*

The defendant moved to vary the certificate by allowing three small items, and also by disallowing two items, surcharge on the accounts, which the chief clerk had allowed, to the extent altogether of 1233*l.* 15*s.* 8*d.*

The first of these items disallowed was a sum of 212*l.* 5*s.*, which Edward Seed claimed to retain for services rendered by him to the testator in collecting the rents of his cottage property, and for constant care and attention bestowed on the testator himself and in the management of his property both by himself and by Peter Wroe. He said that both defendants were repeatedly told by the testator that they were to charge for their services.

The next item was a sum of 161*l.* 7*s.* 3*d.* retained by

the other defendant Peter Wroe under similar circumstances.

The third item, 100*l.*, was a sum claimed by both defendants for travelling and other expenses incurred in collecting the rents of the testator's estate, and in finding out the various legatees.

There were also other small surcharges which the chief clerk had allowed as to which the motion sought to have the certificate varied.

Mr. *Malins* and Mr. *Cadman Jones*, for the plaintiff, opened the case, and asked that the executors might pay the costs of the suit. This Court always took an indulgent view of the conduct of trustees and executors, and never visited them with costs except in cases of gross neglect. It was hardly possible to conceive a grosser case of deliberate neglect than in this case. [They cited *Springett v. Dashwood* (a), and *Kemp v. Burn* (b).]

Mr. *Bacon* and Mr. *Streeten*, for the defendants, submitted that the executors were ignorant men, who were not fully aware of the duties of their office. There had been no breach of trust, nor was there anything of that sort suggested. It was submitted, therefore, that the Court would not punish the defendants' inexperience so severely.

THE VICE-CHANCELLOR:—

The first question is as to the motion to vary the certificate so far as it disallowed the defendant's claim for remuneration for their services, on the ground that the testator agreed to allow such remuneration. I think, upon the evidence, the chief clerk was right, and so far the motion to vary it fails.

But I desired that the case should be heard on further

1863.

WROE

v.

SEED.

Statement.

Argument.

Judgment.

(a) 2 Giff. 521.

(b) 4 Giff. 348.

1863.

WROE

v.

SEED.

Judgment.

consideration before I disposed of the motion to vary the certificate, because upon the question of costs there may be circumstances of such laudable conduct on the part of defendants who are executors as will justify the Court in dealing tenderly with them with regard to a demand of this kind; and there certainly is here conflicting evidence. Now, having heard the whole case, and having ascertained what the conduct of these executors has been, it seems to me to be a case of gross misconduct.

The will gave certain legacies, and then disposed of the residue. The legacies given by the will were given to persons described by the testator as classes—nephews and nieces, and the children of nephews and nieces.

There is no statement anywhere which suggests that there was any difficulty in finding the persons who were entitled as legatees under the will. It is very fairly contended on the part of the executors that they could not dispose of the residue until something was done as to the payment of the legacies. Even if there had been a difficulty in ascertaining the classes, there are in this will peremptory directions by the testator with reference to those who were entitled to the residue of his estate; and although he allows five years, in the discretion of his executors, for giving the capital to the residuary legatees, there is to be no delay in the payment of the interest. Therefore, upon the death of the testator the residuary legatees had a right to have all the legacies provided for, or at least to have the income of their legacies paid. Has that been done? So far from it, I find that, at the distance of five years from the death of the testator, the residuary legatees, who had obtained not one farthing, made two applications before the bill was filed, and they received most unsatisfactory answers. It is said on behalf of these executors that they are illiterate men, and that they cannot keep accounts. One of them gives an extraordinary description of his

capacity to keep accounts. He shows that he has a capacity to keep his own accounts, but not a capacity to keep trust accounts where he is to account for the property of other people. Now, if a testator appoints a person to discharge the duties of an executor, inasmuch as he is sworn to discharge his duties as executor, his first duty plainly is, if he cannot keep accounts, to provide some one who can, because in this Court the first and primary duty of every executor or trustee having money in his hands to be received and to be paid is, that an account of his receipts and payments should be kept, to be produced to those interested in the account when it is properly demanded. In this case, up to the time when the bill was filed no account that could be shown had been made out. The bill was filed in July, and it is stated that in the month of April preceding an attorney's clerk was employed to make out an account, but he could make out nothing that could be presented, and nothing that is now relied on.

Here were executors with a very large estate; 11,000*l.* of it is said to have been in advance, ready to be distributed at the death of the testator. What conduct can be more grossly improper than that of executors, who were to pay legacies and to distribute the residue, with a direction to pay the income of the residue immediately, but who did not pay the income; who can suggest no difficulty as to knowing who the legatees were; who, for five years after the testator's death left legacies unpaid, the residue almost wholly undealt with, no account ready that can be produced, and no account taken until this bill is filed; and who, when this bill is filed, bring forward demands against the estate on their own behalf which the Court has found it to be its duty wholly to disallow. The questions to be disposed of with regard to them now are, the question of the costs of this litigation, and that of the interest on their balances. One part of

1803.
WROB
v.
SEED.
Judgment.

1863.
WROE
v.
SEED.
Judgment.

the conduct of these executors, which their counsel has endeavoured to show was laudable and discreet, was, that each of them took 1000*l.* to his own house. One of them says he kept this sum in gold, and applied it for no purpose. They say that they kept these sums for the purpose of paying legatees if they should expectedly or unexpectedly come to demand any money. That is gross misconduct. It is highly culpable and gross misconduct for any executor who has a legacy immediately payable to take into his own house money for the purpose of paying it, and to keep it five years, there being no difficulty in ascertaining who the legatee is, and producing it only in consequence of a decree made against him by this Court. On these sums of 1000*l.* each so improperly kept in their own hands, these executors must be charged with interest at 5*l.* per cent. The balances have been ascertained by the chief clerk. Yearly interest on those balances at 5*l.* per cent. must be paid; because, although some of the residuary legatees are parties, all are not before the Court, and the Court is bound to regard the interests of those who are not here to protect themselves. They are entitled to look to the Court for protection, and for the receipt of what is justly due to them, and that can only be done by directing payment of interest at 5*l.* per cent. Inasmuch, however, as the testator seems to have employed a country bank, and there was a sum in the bank at his death, whatever interest has been received (and the amount is easily ascertainable) the executors will have the benefit of. But, because an executor finds the money of his testator deposited to a large amount in a country bank, that is no reason why, having legacies to pay, and being directed immediately to distribute the income of the residue, he should keep the money there for years. Whatever interest they received in respect of that money they will be entitled to. That seems to be the strict justice of the case. Some grounds for indul-

gence have been stated, but really I do not see anything in any of them that affords any palliation. It is no excuse that these executors are men in humble life, because honesty is as much a duty, and I hope a practice, in humble life as it is in a much higher station; and whether his station be high or low, an executor who misconducts himself in this Court must be dealt with exactly in the same manner. These are defaulting executors, and executors who have misconducted themselves, and they must pay the costs of all the litigation except so much as has been occasioned by the entering into the pedigree. I have some doubt even about that, because it is quite consistent with anything that appears on the pleading that these executors may have known this pedigree all along. On the whole, however, I think I am bound to pursue the ordinary course, which will be to relieve the executors from the costs of proving this pedigree, and to give them their costs in the ordinary way as between solicitor and client of that investigation. I allow these costs on this principle—that if there was any difficulty in ascertaining classes of residuary legatees their duty was to have filed a bill, and to have it done under the direction of the Court; and under the direction of the Court the pedigree might have been ascertained, and they would have been entitled to costs between solicitor and client.

1863.
WROB
v.
SEED.
—
Judgment.

1803.

July 10 & 11.

Re HUGHES'S TRUSTS.

Covenant by husband and wife to settle "all real or personal estate, property or effects to which the wife or the husband in her right shall by gift, descent, succession, or otherwise become entitled—
Held to include reversionary interests in Consols, which fell in by the death of a tenant for life, after the decease of both husband and wife.

Graffley v. Humpage,
 1 Beav. 40,
 followed.

UNDER an indenture dated in 1812, a sum of 10,000*l.* stock was assigned to trustees by William Hughes, on trust as to one moiety for his grand-daughters, Sophia, Caroline, Constantia, Sabina, and Emma Hewitt, in equal shares, to be absolutely vested in and transferred to them respectively, upon their attaining twenty-five or marriage previously; and in the event of the death of any of them under twenty-five, or unmarried, remainder to the survivors. The second moiety was given to the trustees, on trust, as to one fifth part, when and in case the said Caroline Hewitt should attain twenty-five, to pay to the said Caroline Hewitt during her life the interest and dividends thereon for her separate use, without power of anticipation, and after her decease upon trust to pay the said stock among her children.

Caroline Hewitt, in November, 1822, being then an infant, intermarried with Nathaniel Dando, and by a settlement executed on her marriage one fifth part of the moiety of the sum of 10,000*l.* was assigned to trustees for the benefit of the intended wife for life, and after her death, as to two thirds and one third, upon trust for the children of the marriage.

By a settlement made the 3rd June, 1856, previously to the marriage of Adelaide Dando, one of the children of the last-mentioned marriage, and Edward Hill, after reciting that, upon the treaty for the said intended marriage, "it was agreed that any property, of whatever nature or kind (except as thereafter mentioned), to which the said Edward Hill and Adelaide Dando, or either of them in right of the said Adelaide Dando, should by any means become absolutely entitled

should be settled and limited in manner thereafter mentioned, and that for that purpose the said Edward Hill and Adelaide Dando should enter into the covenant thereafter in that behalf contained.

1863.
Re HUGHES'S
TRUSTS.
Statement.

The covenant was as follows:—Edward Hill and Adelaide Dando “jointly and severally covenant and agree with the trustees, that if, at any time or times during the said then intended marriage, they, the said E. Hill and A. Dando, or either of them in her right, should by gift, descent, succession, or otherwise howsoever, become entitled to any real or personal estate, property, or effects of the value or to the amount of 100*l.* or upwards, at any one time (other than and except interests which should be restricted to the life of the said Adelaide Dando, and which should be settled and limited to her separate use and disposal), then, and in every such case, the same should be forthwith conveyed, assigned, assured, transferred and paid to the trustees or trustee for the time being, so far as the estates or interests in such future property would extend,” upon the trusts therein expressed.

The wife died in 1859, leaving one child; the husband died in 1862. Mrs. Dando, the tenant for life under the deed of 1822, died in December, 1862, and upon her death several sums exceeding 100*l.* comprised in the deeds of 1812 and 1822 became payable. The question then arose whether these sums were included in the covenant to settle after-acquired property. The trustees paid the fund into court under the Trustee Relief Act. A petition was thereupon presented by the trustees of the settlement of Mr. and Mrs. Dando for payment to them of the funds so paid in.

Mr. *Greene* and Mr. *Shebbeare* for the trustees.

Argument.

The recital in the settlement clearly showed that it was the intention of the parties that all sums of money

1863.
Re HUGHES'S
 TRUSTS.
 Argument.

(over 100*l.*) or other property to which the wife or her husband in his right should become entitled were to be settled. This case was clearly covered by the case of *Graftey v. Humpage* (a). In that case a sum of money by an anterior instrument was settled upon the wife for life, remainder to her children, remainder as she should appoint, and in default to her executors, administrators, or assigns. It was held to be within the operation of the covenant. The present case is not distinguishable from that case. The same principle was laid down in *James v. Durant* (b). In *Blythe v. Granville* (c) the Vice-Chancellor of England acted on the same view. [*Ex parte Blake* (d) was also cited.]

Mr. *Malins* for the administrator of the husband.

Where certain property belonging to the intended wife either in possession or reversion is not included in the settlement, unless by mistake, the only inference that can be drawn is that it was not the intention of the contracting parties that it should be brought into settlement. This was the view acted on by Vice-Chancellor *Kindersley* in the case of *Archer v. Kelly* (e). His Honour observed that the words "becoming entitled" meant the husband becoming entitled by means of the wife's becoming entitled, and not in respect of a right which the wife had. The cases of *Graftey v. Humpage* and *James v. Durant* were not approved by the profession, and the present Lord Justice Knight Bruce had intimated his dissent from the doctrines laid down in these cases:

(a) 1 Beav. 46. In *Graftey v. Humpage* the words are, "should at any time thereafter during the coverture." In *James v. Durant* the words are, "should at any time thereafter." In *Blythe v. Granville* the words are, "should during coverture

become entitled." In *Ex parte Blake* the words are, "should at any time thereafter."

(b) 2 Beav. 177.

(c) 13 Sim. 190.

(d) 16 Beav. 463.

(e) 1 Drew. & S. 300, 308.

Hoare v. Hornby (a); Vice-Chancellor Kindersley also expressed himself dissatisfied (b) with the reasoning in *Blythe v. Granville*, and indeed with *Grafftey v. Humpage*. In *Otter v. Melville* (c) Vice-Chancellor Knight Bruce held that a covenant in an ante-nuptial settlement, that all the personal estate to which the wife shall become entitled should be subject to the trusts of the settlement, did not include property to which, without the knowledge of the intended husband or the trustees, she was then absolutely and immediately entitled.

1863.
Re HUGHES'S
TRUSTS.
Argument.

It was submitted on these authorities that the funds which had fallen in were not within the covenant, and therefore passed to the husband's representative.

See also *Grey v. Stuart* (d).

Mr. *H. Shebbeare* appeared for the other parties.

The VICE-CHANCELLOR :—

Judgment.

I think the property is clearly within the covenant in

NOTE.—In *Archer v. Kelly* Vice-Chancellor Kindersley, referring to *Blythe v. Granville* (e), observed—"I certainly had not the smallest intention of intimating any dissent from that decision; and, indeed, my present decision shows that I quite agree in its soundness. The observations I made referred to one part of the Vice-Chancellor's reasoning in that case which was as follows:—'The covenant, therefore, plainly applies to the property which the wife would become entitled to when the coverture took effect. The coverture was the fu-

turity referred to. Immediately on the marriage taking place the wife became entitled to the property during the coverture.' The reasoning, therefore, was that, inasmuch as before the marriage the lady was not entitled during the coverture, and after the marriage she was entitled during the coverture, this was such a change of condition with respect to her interest in the property as brought it within the operation of the covenant: and it was only from this portion of the reasoning I ventured to express my dissent."

(a) 2 Y. & C. C. C. 121, 129.

(e) 2 De G. & S. 257.

(b) *Wilton v. Colvin*, 3 Drew. 617, 624-5.

(d) 2 Giff. 398.

(e) 13 Sim. 190.

1863.
 Re HUGHES'S
 TRUSTS.

Judgment.

the settlement, and there must be a declaration that the petitioners are entitled, and that the stock be transferred to them.

The criticisms made on the case of *Grafftey v. Humpage* and *James v. Durant* are not, in my opinion, well founded, and I do not feel myself justified on such grounds in shaking the authorities of those cases, which, in my opinion, are in accordance with the laws of this Court.

1864.

July 2.

Rails and other chattels which by the terms of the contract when placed on the land became the absolute property of the company, the contractor to have no property therein, except the right of using them on the land for the purpose of the works, except on completion of the line, as a condition precedent, the plant was to be given to the contractor as part consideration, or if used by the company to be paid for—*Held*, not liable to be taken in execution for the company's debts.

BEESTON v. MARRIOTT.

THE bill was filed by the plaintiff, who had contracted with the company, the Manchester and Milford Railway Company, for the construction of that part of the line between Llanidlos and Llanguerig.

By the terms of the deed of contract it was stipulated that the contractor should find and provide all the plant and materials necessary for carrying out the contract, &c.; and "that from time to time, as and when any material or plant whatsoever should be upon or brought upon the site of the said works, or upon land adjoining thereto and belonging to the company, then and immediately thereupon the said materials or plant should become and be the absolute property of the company, and be and be considered as in their possession; and that the contractor should have no property therein or in respect thereof, at law or in equity, except the right of using the same upon the premises of the company merely for the purposes of the said works, and except that, if the contractor should duly complete the whole of the said contract, then after the full and due completion of all such works

as a condition precedent, the company would give unto the contractor, as a part of the consideration of his performance of the said contract, the said plant, unused and unconsumed materials; the bringing of the said plant and materials upon the said premises by the contractor, upon the terms aforesaid, being one of the conditions for the company entering into the said contract on their part; and that if any work should be taken out of the hands of the contractor by the company, in pursuance of the conditions thereafter referred to or otherwise on account of any default of the contractor, then and in every such case it should be lawful for the company, or any person with whom they should contract, or whom they should employ for the execution or prosecution of the same work, to use and employ therein all or any part of the said materials and plant, making only such compensation therefor, to the contractor, his heirs, executors, or administrators, as the principal engineer of the company should think just, and should by writing under his hand award to be paid."

The agreement further provided that the company would, as the works proceeded, make monthly payments to the contractor, upon the certificates of the engineer, to the full amount of the work executed and materials supplied, less five per cent., which was to be retained by the railway company as a guarantee fund for the due performance of the contract.

The works had been prosecuted and a considerable portion of the line completed, and large sums had been paid to the contractor on the certificate of the company's engineer. There were upon the company's land large quantities of rails, chairs, plates, &c., &c., used in the construction of the works.

At the time of the issuing of the execution hereinafter mentioned, the contractor had deposited upon the lands of the railway company, for the purposes of executing

1864.
BEESTON
v.
MARRIOTT.
Statement.

1864.
 BEESTON
 v.
 MARRIOTT.
 ———
Statement.

his contract, large quantities of iron rails, railway chairs, fish-plates, plant and materials.

Messrs. Marriott & Jordan were the solicitors to the company, and claimed from the company a sum of 5803*l.* 16*s.* 6*d.* for bills of costs, for which they had signed judgment against the company. Upon this judgment they on the 28th February, 1863, issued execution, and under that execution the sheriff seized the iron rails, railway chairs, fish-plates, and other materials, on the ground that by virtue of the foregoing clauses of the contract, coupled with the payments on account, the legal ownership of the goods was absolutely vested in the railway company, and that the goods were therefore liable to be taken in execution.

The plaintiff thereupon filed a bill for an injunction to restrain the sheriff from selling the goods seized, praying for a declaration that neither the defendants, the railway company, nor Messrs. Marriott & Jordan, had any right or interest therein, except subject to the right of the plaintiff to use and employ the same in the construction of the works, and also subject to his right to such as should be unconsumed on the completion of the contract.

A motion for an injunction was made in March, 1863, but was directed by his Honour to stand over till the hearing of the cause. The defendants agreed to accept notice of motion for a decree, the sheriff in the meanwhile to withdraw from possession.

Argument.
 ———

Mr. Bacon and Mr. Bovill appeared for the plaintiff, and contended that the chattels though in one sense as between the plaintiff and the company, they belonged to the company, yet as between the company and third persons the company had no absolute property in them. Their title was subject to the rights of the plaintiff, both as to the use of them for the purpose of the works, and

the right to them on the completion of the works. It was submitted, therefore, that the plaintiff was entitled.

Mr. *Malins* and Mr. *Dickinson*, for the execution creditors.—Under the terms of the contract, the moment the contractors brought plant or materials on the company's ground they became the property of the company both at law and in equity.

The contractor's right to use the plant, &c., and to the surplus after the completion of the works, for the purpose of the works, did not cut down the absolute title of the company, but simply gave to the contractor a right of action for the breach of the covenant.

Secondly, the company had in fact made large payments which gave them an equitable title.

Mr. *Locock Webb*, for the company, took the same view.

Mr. *Speed* appeared for the sheriff.

The VICE-CHANCELLOR:—

The question in the cause is, whether the defendants *Marriott* and *Jordan*, who are creditors of the railway company (also defendants), are entitled to take in execution certain rails and other chattels which, under an execution issued by them as creditors of the company, have been taken in execution by the sheriff.

The plaintiff contends that these rails and other chattels are not the property of the company in such a sense as that the company themselves, or any creditor of the company, can deal with them as the separate and absolute property of the company, so as to take them in execution.

The right must be governed by the stipulations in the contract.

It has been argued, however, on behalf of the creditors

1864.
BEESTON
v.
MARRIOTT.
—
Argument.

Judgment.
—

1864.
BEESTON
v.
MARRIOTT.
—
Judgment.

of the company, and of the company itself, that, according to the stipulations of the contract, these rails and other chattels, when placed where they now stand upon land taken by the company for the purposes of their undertaking, are by the express terms of the contract the absolute property of the company, and that the present plaintiff has no interest nor right of property whatever in them. It is true the contract says that, placed upon the ground, these chattels shall be the absolute property of the company, and that the plaintiff shall have no property in them; but immediately afterwards follow three exceptions, qualifying that absolute right of property in the company which the first words of the contract give to them. These exceptions are, first of all, that all these chattels are to be under the dominion of the plaintiff, who has the right to use them; that they shall be under his dominion for the purpose of using them; that so much of them as shall not be used for the purpose of constructing the railway when he has completed his contract shall then be given to the plaintiff as part of the consideration for performing the contract. There is a further stipulation that if, instead of the plaintiff using those chattels, circumstances shall occur to entitle the railway company to use them, the railway company using them shall make compensation to him in respect of them. It seems, therefore, that that absolute right of property in the company which is given to them for the purpose of preventing the chattels being taken in execution when on the ground of the company by any creditor of the plaintiff is qualified by these important stipulations. The right of using them; the right, as to some of them, of becoming absolutely possessed of them; the right to demand compensation from the company if the company shall use them, so qualify the right of the company, and give such a right and interest to the plaintiff in these chattels, that they cannot be considered the

property of the company so as to be taken in execution by any creditor of the company. They are chattels upon the ground of the company dedicated to a particular purpose, in which purpose both the plaintiff and the defendants are interested as to the use of the chattels; and as to the surplus, they are ultimately to become the absolute property of the plaintiff. Chattels in that situation cannot be taken in execution. The plaintiff is entitled to the relief he prays. The defendants who have thus, in my opinion, improperly taken these chattels in execution, and the railway company, who join the defendants in claiming the chattels as the absolute property of the railway company, must pay the costs of the suit.

1864.
BEESTON
v.
MARRIOTT.
—
Judgment

1863.

July 8 & 9.

WILKINS v. SIBLEY.

The trustee of a sum of stock, being beneficially entitled to one moiety undivided, assigned his interest to a mortgagee, who placed a *distringas* on the moiety. The trustee afterwards sold out a moiety and absconded. On a bill by the *cestui que trust* of a moiety, the Court held that he was entitled to the remaining moiety, but gave the mortgagee his costs.

BY a settlement dated the 9th and 10th October, 1828, executed on the marriage of Mr. and Mrs. Draper, reciting that a sum of 2700*l.* Three per Cent. Bank Annuities, had been transferred into the names of Francis Wilkins and Joseph Wilkins, as trustees, it was thereby declared that the said sum of stock, together with certain other property, was transferred to them upon trust, as follows, viz., after the solemnization of the marriage to pay the income to the intended wife during her life for her separate use, and from and after her death to permit the intended husband to receive one moiety of the income during his life; and if there should be no child of the said marriage, on trust, after the death of the said intended wife, and during the life of the said intended husband, to pay the other moiety of the said income to Ann Wilkins, the mother, "if she should be then living; and if not, then that the said Francis Wilkins and Joseph Wilkins should retain the same moiety of the said trust-moneys for their own use in equal shares;" and after the decease of the said wife and husband, then upon trust to pay the whole of the income to Ann Wilkins for her life, "if she should be then living; and if not," then that the said F. Wilkins and J. Wilkins should retain the whole of the said trust-moneys for their own use in equal shares.

Mrs. Draper died in July, 1845, without ever having had any issue.

Joseph Wilkins, the trustee, died in November, 1846, leaving four infant children, and having by will bequeathed all his personal estate to the plaintiffs, Letitia Coles Wilkins and John Bailey, whom he also ap-

pointed his executors and trustees, upon certain trusts for the benefit of his wife and children; and in case of all his children dying before their shares became vested respectively, bequeathed all his personal estate to the said Francis Wilkins. Ann Wilkins died in 1848; and soon after her death Francis Wilkins sold out a moiety of the stock, and divided the proceeds between himself and the plaintiff, leaving 1350*l*. Three per Cent. Annuities standing in the name of Francis Wilkins.

In January, 1855, Francis Wilkins mortgaged certain real estate to the defendant Robert Sibley to secure 700*l*. and interest, and in April 1851 he assigned to Sibley one moiety of the sum of 1350*l*. stock, by way of further securing the 700*l*., and a further advance of 300*l*. In October, 1851, the moiety was again charged with a further advance of 250*l*.

On the 5th May, 1851, the defendant Sibley obtained a *distringas* on a moiety of the sum of 1350*l*. Bank Annuities. F. Wilkins, in July, 1852, without the knowledge of the plaintiffs, sold out the sum of 675*l*., being one moiety of the said sum of 1350*l*. Three per Cent. Annuities, and applied the proceeds of the same to his own use. He afterwards absconded.

James Draper, the husband, in May, 1854, presented a petition to the Court, upon which W. Edwards and the defendant R. Sibley were appointed trustees of the indenture of the 10th October, 1828, and were ordered to transfer the said sum of 675*l*. Three per Cent. Annuities into court; it was further ordered that the dividends of the residue, after payment of costs, should be paid to James Draper for his life, or until further order; also that no part of the said sum of stock should be sold, transferred, or disposed of "without notice to the executors of the said Joseph Wilkins, and to the defendant Robert Sibley or his executors;" and it was declared that, "subject to any right which the defendant Sibley might have under

1863.
WILKINS
v.
SIBLEY.
Statement.

1863.
 WILKINS
 v.
 SIBLEY.
 —
Statement.

or by virtue of any mortgage security thereby vested in him," so much of the said 675*l.* as should be sold as afore-
 should be replaced out of a share to which F. Wilkins
 should be entitled in a sum of 250*l.*, part of the said
 trust property.

By payment of costs the sum of 675*l.* was subse-
 quently reduced to 612*l.* 3*s.* Three per Cent. Annuities.
 James Draper died in 1860, and upon his death the
 plaintiffs claimed to be absolutely entitled to the sum of
 612*l.* stock. The defendant Robert Sibley claimed the
 stock as assignee of Francis Wilkins. The bill was
 filed for the administration of the trusts of the settle-
 ment.

The plaintiffs charged by their amended bill, "that
 F. Wilkins, when he sold the said 675*l.* Bank Annuities,
 intended to sell the moiety of the said 1350*l.* Bank
 Annuities to which he was entitled, and not that to
 which plaintiffs were entitled, and as evidence thereof
 they showed that in a letter from the said F. Wilkins to
 the said defendant Sibley, without date, but received by
 the defendant in July, 1858, and now in defendant's pos-
 session, the said F. Wilkins admitted that fact.

The defendant Sibley by his answer submitted that,
 if the plaintiffs had placed a *distringas* on their moiety of
 the fund, which they had neglected to do, the whole
 sum would have been protected from the improper
 transfer. He also adduced evidence to show that
 F. Wilkins intended to have sold out the whole sum if
 he had not been prevented by the *distringas*.

Argument.
 —

Mr. *Greene* and Mr. *Cracknall* for the plaintiff.—The
 principle to govern this case is well settled, that where
 a trustee, having a beneficial interest in part of the estate
 of which he is trustee, is guilty of a breach of trust, his
cestui que trust is entitled to have the trustee's share
 applied to make good the monies that have been mis-

applied: *Morris v. Livie*(a). In the case of *Brandon v. Brandon*(b) the Lords Justices by their decree admitted the principle laid down in *Morris v. Livie*.

If this were the true view of the law, the plaintiffs had a lien on the stock, and no notice or *distringas* could affect it. The purchaser took it subject to all prior equities, and could not set up his purchase against the plaintiff's right: *Greswold v. Marsham*(c), *Toulmin v. Steere*(d), *Parry v. Wright*(e), *Brown v. Stead*(f).

Mr. Bacon and Mr. Walford for the defendant.—In this case it was quite clear the defendant preserved the fund.

The defendant had done all in his power to perfect his security, and the plaintiffs had done nothing. In *Etty v. Bridges*(g), where there was no trustee to whom notice could be given, because a mortgagee of stock did not by *distringas* or otherwise attempt to perfect his security, a person who, without notice of his incumbrance, advanced money on the stock and obtained a *distringas*, was held to have priority. *Case v. James*(h), *Mocatta v. Murgatroyd*(i), *Watts v. Symes*(j), *Kekewich v. Manning*(k), *Gregg v. Abbott*(l), *Irby v. Irby*(m), *Lewin on Trusts*(n).

The VICE-CHANCELLOR:—

If a trustee who has also himself an interest in the trust fund assigns his beneficial interest therein, and then commits a breach of trust by abstracting any part of the trust-fund, the other *cestuis que trust*, as against the

1863.
WILKINS
v.
SIBLEY.
—
Argument.

Judgment.
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| (a) 1 Y. & C. C. C. 380. | (h) 3 De G. F. & J. 256. |
| (b) 3 De G. & J. 324. | (i) 1 P. Wms. 393. |
| (c) 2 Cases in Ch. 170; Jarman's | (j) 16 Sim. 640. |
| Byth. 142. | (k) 1 De G. M. & G. 176. |
| (d) 3 Mer. 210. | (l) Lloyd & G. tem. Sug. 246, |
| (e) 1 Sim. & St. 369; 5 Russ. 251. | (m) 25 Beav. 632. |
| (f) 5 Sim. 535; 2 David. 249. | (n) Page 172. |
| (g) 2 Y. & C. C. C. 486—494. | |

1868.
 WILKINS
 v.
 SIBLEY.
 ———
Judgment.

assignee of the trustee's beneficial interest, have a clear equity to have the fund under the control of the Court applied to make good that breach of trust. In the case of *Morris v. Livie* (a) that principle was established, and it is a doctrine recognised by many anterior cases. In the case of *Hopkins v. Gowar* (b) the same question occurred. The question there was as to a *devastavit*. Sir A. Hart says, "If an executor assigns his legacy and afterwards is guilty of a *devastavit*, the Court will lay its hand on the legacy, disregarding the assignment. Even if he was a stranger, the assignee of such a legatee takes only what the decree shall adjudge to him; and if an executor misconducts himself so that when the accounts are finally wound up he is subject to costs, the assignee of his legacy must bear the consequence."

According to that view of the law, at the time when the defendant Sibley proceeded to put a *distringas* on the stock, the stock upon which he was going to apply the *distringas* was subject to the equity claimed by the bill. That proposition cannot be questioned. But the argument here has turned principally upon the effect of the *distringas*. I have been unable to see upon what possible ground the *distringas* in any degree relieved the fund on which it was placed from the equity which attached to it before the *distringas* was issued. The effect of the *distringas* is notice; the object of it being that the fund should not be touched without the claim of the person asserting being discussed. In the case cited, the view of Lord Justice Knight Bruce would seem to be that a *distringas* has much higher operation than notice upon a fund in the trustee's hands, because a *distringas* makes it impossible that a fund should be dealt with at all; where there is a *distringas* on stock, the Bank of England gives notice

(a) 1 Y. & C. C. C. 380.

(b) 1 Moll. 561.

to the issuer that unless he takes proceedings in a short time to assert his right the *distringas* will be disregarded. But a trustee who has received notice has no right to say that, unless the party files a bill to assert his claim, the notice shall be disregarded; and any trustee who should say that would still remain liable to the consequences of notice, and his requisition to take proceedings might be disregarded. Therefore, but for the *dicta* referred to I should not have thought that the *distringas* or notice could have affected the right. No doubt great weight is due to observations made by the learned judge, and, although I do not find in that case that the other Lord Justice took the same view, still the opinion so expressed carries with it the weight which is justly due to it.

The purpose of a *distringas* is to prevent a fund being dealt with without the person who issues it having an opportunity of asserting his claim. Here, then, it seems to me the fund in question was clearly liable to the equity of the plaintiff at the time when the defendant Sibley went to the Bank with this *distringas*.

It has been said that the effect of a *distringas* is precisely the same as if this fund had been taken out of the name of one trustee and put into the name of another trustee. If that had been really done, other considerations would arise; but, practically, the *distringas* had no such effect; the effect was to give to Sibley an opportunity to establish his right to the fund in a court of equity.

It was the duty of the defendant Sibley to see, he being entitled to half the fund, that he took his assignment subject to the equity of the plaintiff. A *distringas* has no effect whatever as against the assignor; but the party must take subject to the same equity as before. The assignment can only be taken as operating like other deeds between assignor and assignee.

1863.
WILKINS
v.
SIBLEY.
—
Judgment.

1863.
 WILKINS
 v.
 SIBLEY.
 —
Judgment.

On a full view of the whole case I must hold that the effect of a *distringas* was not to take away the equity which so existed in another person, in respect, not of that share, but of the other share.

Then it is said, the defendant's diligence has preserved the fund—that but for him there would be no fund at all for the adjudication of the Court; but I am at a loss to know what right the defendant has to half the fund. Certainly he is not entitled to the whole fund; then by what right is he entitled to half? It may be said that he has not been acting for his own benefit, but for the benefit of the plaintiff himself. Still, the argument, though it fails on the main question, is yet entitled to some weight on the subject of costs, though the fund remains subject to the equity of the plaintiff. Upon the question of costs the case stands thus:—Unless the fund had remained in court this equity could not have been asserted at all. But it is through the act of the defendant that the fund is in existence. I do not think that, where a bill is framed with a view of having the rights of the plaintiff established, I can very well saddle the defendant Sibley with the costs of the suit so far as it relates to his adverse claim. There is no reason certainly why he should have placed the *distringas* upon the whole fund. But, looking at the fact that he has done something which has preserved the fund, I should be dealing hardly with him if I were to make him pay the costs. The case of *Toulmin v. Steere* is said to have no application in this case, and it has indeed been said that that case is not the law of the Court; but it is of great importance that cases should not be shaken and their authority weakened. There is nothing in Lord St. Leonards' great work upon vendors and purchasers to impugn the authority of *Toulmin v. Steere*, although the decision was given against his own argument and that of Sir S. Romilly.

I think the case is clearly in favour of the plaintiff, and at the same time that there is no case to deprive the defendant, who has been a diligent assignee, of his costs.

1863.
WILKINS
v.
SIBLEY.

Judgment.

COOPER v. GOSTLING.

July 10, 11,
13.

BY his will, dated in 1844, Edward Gostling, the testator, devised all those eight acres of land situate in Watlington, in the county of Norfolk, unto his wife Mary during the term of her natural life, remainder to John Gostling and Elizabeth his wife, their heirs and assigns for ever.

The testator died the same year.

Shortly after the testator's death, the Lynn and Ely Railway Company served a notice that they required the land devised by the testator's will, for the purposes of their Act. Ultimately an arrangement was come to by which Mary Gostling, the tenant for life, and John and Elizabeth Gostling, agreed to sell the land to the company for the sum of 900*l*. On the 28th April, 1846, by an indenture of that date between Mary Gostling and John and Elizabeth Gostling of the one part, and the railway company of the other part, it was witnessed as follows:—

“ We, Mary Gostling, of &c., and John and Elizabeth Gostling, of &c., in consideration of the sum of 900*l*. paid

Where a testator devised land to his widow Mary for life, remainder to his son and Elizabeth his wife in fee, who, during the life of the tenant for life, conveyed the land by a deed not acknowledged to a railway company—*Held*, that the wife's interest was within the 7th section of the Lands Clauses Consolidation Act, and passed to the company.

1863
 COOPER
 v.
 GOSTLING.
 —
Statement.

to us pursuant to the Lynn and Ely Railway Act, 1845, by the Lynn and Ely Railway Company, incorporated by the said Act; and I, Elizabeth, the wife of the said John Gostling, for the considerations aforesaid, do, and each and every of us doth, according to our respective estates and interests therein, hereby convey to the said company, their successors and assigns, all that piece or parcel of arable land, containing 8a. Or. 29p., more or less, bounded, &c., together with all ways, rights and appurtenances thereto belonging, and all such estate, right, title, and interest in and to the same as we or any or either of us are or is or shall become seised or possessed of, or are or is by the said Act empowered to convey To hold the premises to the said company, their successors and assigns for ever, according to the true intent and meaning of the said Act."

The deed was in the form set forth in the Schedule to the Lands Clauses Consolidation Act, 8 & 9 Vict. c. 18, and was in pursuance of the 7th section of the Act. It was signed and delivered by the three parties therein mentioned, but was not acknowledged by Mrs. Gostling. The purchase-money was invested in the sum of 914*l.* 2*s.* 8*d.* Consols, in the names of Mary Gostling, John Gostling, and James Raven; and by an indenture or deed of trust, which was executed by Mary Gostling, John Gostling, and James Raven alone, but was not executed or assented to by Elizabeth Gostling, it was declared that the dividends should be paid to Mary Gostling for her life, and after her decease that the stock should be transferred to and to the use of John Gostling, his executors, administrators, and assigns.

John Gostling died in November, 1852, having by his will, dated the 21st July, 1841, devised all his lands and hereditaments, in the county of Norfolk, with the appurtenances, and all his estate and interest therein, with the rights, members, and appurtenances thereto belonging,

unto his wife Elizabeth Gostling, and her assigns, to hold the same to her for her life; and after her decease he gave and devised the said lands and hereditaments unto his son, the defendant Samuel Gostling, to hold the same with the appurtenances unto the said Samuel, his heirs and assigns for ever. He bequeathed all his personal estate of every description to his said wife, Elizabeth Gostling, whom he appointed his sole executrix.

Elizabeth Gostling survived her husband; she made no disposition of real estate, but by her will dated 6th February, 1850, bequeathed all her personal estate to her two sons Samuel and John, whom she also appointed her executors, upon trust, for all her children who should attain twenty-one, or die under that age leaving issue, share and share alike. Samuel Gostling was her heir-at-law.

The tenant for life, Mary Gostling, died on the 5th January, 1858. On her death, Samuel Gostling claimed the trust fund as land. The other children of Elizabeth claimed to be entitled to share therein, as being personal estate. In 1860, Samuel, the heir, became bankrupt, but his assignees disclaimed.

The 7th section of the Act, 8 & 9 Vic. c, 18, is as follows:—"It shall be lawful for all parties being seised, possessed of, or entitled to, any such lands or any estate, or interest therein, to convey or sell, or release the same to the promoters of the undertaking, and to enter into all necessary agreements for that purpose; and particularly it shall be lawful for all or any of the following parties so seised, possessed, or entitled as aforesaid, so to sell, convey, or release (that is to say), all corporations, tenants in tail or for life, *married women seised in their own right*, or entitled to dower, &c., and the power so to sell and convey or release as aforesaid, &c., may lawfully be exercised by all such parties, &c.; and as to

1863.
COOPER
v.
GOSTLING.
—
Statement

1863.
 COOPER
 v.
 GOSTLING.

Argument.

such married women, whether they be of full age or not, as if they were sole and of full age," &c.

The bill was filed by one of the children of Elizabeth.

Mr. *Malins*. — The interest of Mrs. Gostling was clearly that of a married woman seized in her own right, and, if so, was within the Act. It was true that her husband was jointly seized with her, but that did not cut down her right. If she was not seized in her own right, what was her interest? But if she were, the deed under the operation of the 7th section effected a conversion of the land.

Secondly, if not converted under the Act, by the election of all parties the proceeds of the sale were treated as personal estate.

[*Pye v. Daubuz* (a) was cited.]

Mr. *Bacon*, Mr. *Craig*, and Mr. *W. H. Terrell*, for the heir. — The 7th section contained no words authorising the disposition by a married woman, of an interest of this nature, by a simple deed without acknowledgment. Mrs. Gostling was "not a married woman seized in her own right." She and her husband were tenants by entireties of the reversion in the land; her husband had not any right, as against her, to alien any part of the land; but on his death in her life-time the entirety belonged to her (b). She was not "seized" during the life-time of Mary Gostling, because there can be no seisin of an estate not in possession. The deed, therefore, was inoperative under the Lands Clauses Act as against the wife, and, not being acknowledged, it was a mere nullity. There was, therefore, no conversion of the land into money, but the purchase-money remained impressed with the

(a) 3 Bro. C. C. 595.

(b) Preston on Abstracts, 39, 41, 43.

character of land, and, Mrs. Gostling having died intestate as to realty, it passed to her heir-at-law. [They cited *Ex parte Cramer* (a), and *Midland Railway v. Oswin* (b).]

1863.
 COOPER
 v.
 GOSTLING.
 —
 Argument.

There was no evidence to show any acquiescence on the part of Samuel Gostling that the consideration for the purchase should be treated as money.

Mr. *Graham Hastings* appeared for the assignees.

The VICE-CHANCELLOR:—

Judgment.
 —

This bill is framed with a view to establish the right of the plaintiff to money produced by the sale of land to a railway company as personal property. For the defendant it is insisted that that money, although personal property, has impressed upon it the character of land, and that no act was ever done by the person entitled to the money to manifest an election to enjoy it as money, and not as land. Upon this part of the case there is a good deal of evidence tending to show that the right of election was exercised. This part of the argument assumes that the land was converted into money which retained the character of land, and must be considered as land until some act of election was shown. The evidence goes to show that the parties entitled to it elected to take it as money, and not as land. But the assumption that this money was impressed with the character of land, and that it required some act, as an act of election, to entitle those who claim it to enjoy it as money, seems to me not warranted by an accurate view of the nature of the transaction by which the conversion into money took place. It was not by the intervention of this Court, but by an agreement entered into out of court with the railway company under the statutory powers of the Act, that a bargain was made to sell the

(a) 1 Sm. & G. 32.

(b) 1 Coll. 74, 80.

1863.
COOPER
v.
GOSTLING.
—
Judgment.

land and convey it, and to take the money as purchase-money instead of land. But for the 7th section of the Act such a transaction could not have been effected, because the case is one in which Elizabeth Gostling, the person in whose right those who now claim the money are entitled, was at the date of the transaction under the disability of coverture; and the land in question, as to her reversionary interest, was in the anomalous position in which in this country real property is placed during coverture where land is the property of the wife. That, however, is of little importance, because the question now to be decided is whether the transaction of the sale to the railway company of this land, and the conversion of it into money, was a transaction authorised by the 7th section. The preliminary words of the 7th section of the Lands Clauses Act are wide and general; and the words relied upon in the argument for the invalidity of the deed under this clause, "married women seized in their own right," do not appear to me, looking at the construction of the whole of this section taken together, to describe the nature of the interest of a married woman which is in any way different from the interest which the married woman in this case had in land. But suppose the construction of the Act otherwise, and the transaction invalid: in that case the land would be recoverable as land by those who claim under her. She cannot be entitled to the money if there has been no conversion.

It is said, however, by the defendant, who contends that there has been no conversion, and claims the money as land, that he does not seek to impugn the title of the railway company; but it is difficult to follow this argument, because if he claims the money he must admit the title of the railway company to the land, and must thereby admit the conversion. If the transaction with the railway company was valid, which all parties seem

to admit, the defendant's title is gone, because there must necessarily have been a conversion.

In no view of the case can the defendant claim the money except as through the wife, who, as the evidence shows, dealt with it as money. The plaintiffs, therefore, have established their right to a decree, which must be for payment of one-seventh of the fund to the plaintiffs, with interest from the death of the tenant for life, and costs. The costs of the assignees from the date of the disclaimer must be paid by the plaintiffs.

1863.
COOPER
v.
GOSTLING.

Judgment.

1863.

Nov. 4.

HEMINGS v. PUGH.

Demurrer to a bill alleging that the defendants had received monies on behalf of the plaintiff, of which he could obtain no account without discovery—Allowed with costs.

Where the relation between a principal and agent partakes of a fiduciary character, this Court has jurisdiction, and will direct an account, though the receipts and payments are all on one side.

Phillips v. Phillips, 9 Hare, 471, and *Dinwiddie v. Baily*, 6 Ves. 136, considered.

THIS was a demurrer.

The bill prayed for an account of all moneys received by the defendant on behalf of the plaintiff.

That the defendant might make a full discovery of all sums received by the defendant for or on account of the plaintiff, and might produce and leave with the Clerk of Records and Writs all books, papers, accounts, and other documents containing any entries of any sums charged by the defendant to any persons as paid to the plaintiff, and wholly or partially paid to the defendant by any such persons, or otherwise received by the defendant for or on account of the plaintiff; and that the defendant might pay to the plaintiff what on taking such account might be found due to the plaintiff from the defendant in respect of the receipts by the defendant for or on account of the plaintiff: the plaintiff being ready and willing to make all just allowances.

The bill, as amended, alleged that the defendant had received on the plaintiff's account numerous sums of money, of which the amounts and particulars were unknown to the plaintiff. The bill charged that it was the duty of the defendant to have accounted for and paid such sums received by him as aforesaid to the plaintiff; that the defendant had neglected to pay such sums to the plaintiff or to render any account for the same, though the plaintiff had made numerous applications for an account and payment. The bill charged that the defendant, being pressed to examine his books and documents on the 9th November, 1862, did pay to the plaintiff the

1863.
HEMINGS
v.
PUGH.
—
Statement.

sum of 9*l.* 3*s.* on account of the sums which defendant stated he had discovered that he had received on account of the plaintiff. The bill charged that the defendant on that occasion told the plaintiff that he would make further search among his books and documents, but the defendant had neglected to do so; but sometimes alleged he had not time, and at other times that he had put the books and papers away, and he would not have put them away if they had been required for any purpose, and that therefore nothing would be found due to the plaintiff.

The bill also alleged that the defendant, on the 8th May, 1863, on being informed that the plaintiff had filed this bill, paid to the plaintiff a further sum of 20*l.* 15*s.* 6*d.*, which the defendant on that occasion stated to the plaintiff he had on a further search (which the bill alleged to be a partial search) ascertained to be due. The bill alleged that the defendant had neglected to make further searches, or he would have ascertained that he had received other sums on account of the plaintiff.

The bill charged that, if the defendant would produce such books, papers, accounts, and other documents, and discover the truth, it would appear that a considerable amount had been received by the defendant on the plaintiff's account, which he had failed to pay to the plaintiff as he ought to have done. The bill alleged that such sum was unknown to the plaintiff, and could only be discovered by the evidence of the defendant, by the production of the accounts and papers.

Mr. *Malins* and Mr. *Martindale*, for the demurrer, contended that there was no ground for the interference of a court of equity. The case made by the bill was one of mere agency, and the plaintiff, if he had any

Argument.

1863.
 HEMINGS
 v.
 PUGH.
 —
Argument.

claim at all, had his remedy at law. In *Foley v. Hill*(a), it was held that an account between a banker and his customer consisting only of a few items was not a fit case for a bill in equity—there was no mutuality in the account. [*Phillips v. Phillips*(b) was also cited.]

Mr. *Bacon* and Mr. *Horsey*, for the bill, contended that the plaintiff was entitled to an account. The bill averred, and the allegation must be taken to be true, that the account could not be taken without discovery to the defendant; and this brought the case within the principle laid down in *Mackenzie v. Johnston*(c), and which was a well-settled rule of this Court.

[*Phillips v. Phillips* and *Smith v. Leveaux*(d) were also cited.]

Judgment.
 —

The VICE-CHANCELLOR :—

This demurrer must be allowed. The bill contains a mere averment of the receipt of money by an agent, but that has never been held enough to sustain a bill. There is also a simple bald statement, that without the evidence of the defendant and the production of the books the plaintiff is, unable to obtain an account. Why the plaintiff cannot obtain that evidence in an action is not stated.

In the case of *Smith v. Leveaux* Vice-Chancellor Wood, in noticing the cases of *Dinwiddie v. Baily*(e), and *Phillips v. Phillips*(f), appears to have treated them as authorities to show that this Court will not interfere where the receipts and payments are all on one side. But I doubt whether that be the law of this Court. There are many cases between principal and agent,

(a) 1 Phil. 399 ; s. c. 2 Ho. L.
 Ca. 28.

(b) 9 Hare, 471.

(c) 4 Madd. 373.

(d) 1 H. & M. 123.

(e) 6 Ves. 136.

(f) 9 Hare, 471.

where the receipts and payments are wholly on one side, in which, however, this Court has exercised its jurisdiction. In the case of a steward or land agent, the receipts and payments are almost necessarily on one side; that is, no mutual payments and receipts. Yet that is a case in which this Court from the most ancient times (and more recently during the times of Lord Rosslyn, Lord Thurlow, and Lord Eldon) has exercised this jurisdiction. That jurisdiction still remains, and wherever an agency partakes of a fiduciary character this Court has jurisdiction, and will direct an account, although the receipts and payments are all on one side, and there are no mutual payments between the parties.

That rule has not been shaken by the decision in *Phillips v. Phillips*, though there are passages in the judgment in that case which may seem at first to be inconsistent with the principle to which I have adverted.

Here there is no allegation of any mutual dealings, or of anything fiduciary in the relation of the parties, who on the bill are stated as mere principal and agent. The demurrer must be allowed with costs.

1869.
HEMINGES
v.
PUGH.
Judgment.

1863.

Nov. 21.

CRESSWELL v. DEWELL.

Where a husband entitled to the interest of a fund for life, with remainder to his wife for life, induced the acting trustee to pay him the money, on the written consent of the wife, the trustee having died, his estate, was held liable to make good the moneys so paid, on a bill filed by the widow, and the surviving trustee.

THIS was a bill filed by Thomas Estcourt Cresswell and Harriette Daniel against Charles Goddard Dewell, and it prayed that it might be declared that the estate of Thomas Dewell, deceased, was liable to make good the share of the personal estate of Arthur Dewell, deceased, to which the said Philip Howe Daniel became entitled as one of the next of kin of Arthur Dewell, with interest from the death of Arthur Dewell.

The plaintiff was the surviving trustee of the marriage settlement of Philip Howe Daniel, and Harriette, his wife, by which the two sums of 800*l.* and 300*l.* respectively were assigned to trustees upon trusts for the benefit of Philip Howe Daniel for his life, remainder to Harriette Daniel for her life, with remainder for the benefit of the children of the said marriage; and on failure of such children who being sons should attain twenty-one, or being daughters should attain that age or marry under that age, upon trust as Philip H. Daniel should by will appoint, and in default of appointment in trust for the next of kin of the said Philip H. Daniel, according to the Statute of Distributions.

The deed contained a covenant by Philip H. Daniel to settle after-acquired property, as well personal as real estate, exceeding the sum of 200*l.*

In 1847, Arthur Dewell, who was the uncle of Philip H. Daniel, died intestate, and letters of administration to the estate were, in February, 1848, granted to Thomas Dewell, his brother, who was father of the defendant Charles G. Dewell.

Upon Arthur Dewell's death the share of Philip H. Daniel, as one of the next of kin, amounting to

696*l.* 19*s.* 8*d.* was paid to Philip H. Daniel by Thomas Dewell, with full knowledge of the provisions of the settlement.

1803.
 CRESSWELL
 v.
 DEWELL.
 Statement.

Thomas Dewell died in 1853, having by will devised and bequeathed nearly all his real and personal estate to the defendant Charles Goddard Dewell. A suit was shortly afterwards instituted for the administration of Thomas Dewell's estate, in which his personal estate was wholly administered, and all his real estate which had not been sold for the purposes of the suit was conveyed to the defendant Charles G. Dewell.

In January, 1862, Philip H. Daniel died intestate and in embarrassed circumstances. There were no children of the marriage.

This bill was filed in December, 1862, the plaintiff Cresswell, alleging that he had only then very recently become aware of the death of Arthur Dewell, and of the alleged payment of the 696*l.* 19*s.* 8*d.*

The defendant C. G. Dewell by his answer said, that until the claim of the plaintiff was made in 1861 he had never heard of it, and upon inquiring he had found that the payments in question were made to Philip H. Daniel in the months of March and June, 1848, and that the following memorandum had been signed:—

“Memorandum, this 28th June, 1848. Whereas, Thomas Dewell, Esq., as administrator of Arthur Dewell, deceased, at my request, and with my full sanction and approbation, has paid over to the undersigned Philip Howe Daniel, my portion as one of the next of kin of the said Arthur Dewell, deceased, the one-tenth part or share of certain moneys in which the said Arthur Dewell was interested, notwithstanding I, the said Harriette Daniel, may have any claim to have the same, or any portion thereof, settled to or for my benefit under the terms and provisions of the settlement made and executed on my marriage with my said husband. And I hereby

1863.
 CRESSWELL
 v.
 DEWELL.
 —
Statement.

declare that the payment so made was with my full consent, and that I will wholly oppose and discountenance any proceeding whatever being taken by the trustees of my said settlement, or any party or parties, or any claim being made on my behalf for the purpose of the same being settled or otherwise, and that I will be no party to such proceedings, either by myself or by any next friend on my behalf, and that this assurance, with the full assent of my said husband, is to be taken by the said Thomas Dewell free from any application or annoyance whatever.

“PHILIP HOWE DANIEL.

“HARRIETTE DANIEL.”

The answer objected that P. H. Daniel's personal representative was a necessary party to the suit. The answer also prayed to have the benefit of the Statute of Limitations.

Argument.
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Mr. *Malins* and Mr. *Freeman*, for the plaintiff.—The moment the facts of the case are understood, it appears clearly that the memorandum executed by Mrs. Daniel was a mere nullity, her interest being reversionary. The memorandum was really the act of the husband. In *Purdew v. Jackson* (a), the Master of the Rolls uses this language (b), “What equity is there to qualify her (the wife's) legal right, or to deprive her of it? The acts of the husband can create no such equity, for the law has said that his (the husband's) acts shall not affect the wife's chose in action, unless he reduce it into possession. In this view of the matter it seems to me that it would alter a most important part of the law of England if it were to put it in the husband's power, where he cannot reduce the wife's choses in action into possession, to affect directly the wife's legal title by survivorship.”

(a) 1 Russ. 1.

(b) *Ibid.* 46.

In *Whittle v. Henning*(a), where a fund was limited to a husband for life, remainder to the wife for life, remainder to the son absolutely, the husband and son by deed surrendered and released their interests to the wife, in order to give her an absolute interest in the fund, with a view to assign it to her son, but the Court refused to sanction the transaction, on the ground that the effect would be to defeat its own rules and practice in the protection of married women from marital control. In *Hopkins v. Myall*(b), where the fund was settled on a married woman for life, remainder as she should by writing attested appoint, and in default remainder to her children; and the trustees, on the joint application of husband and wife by letter, but unattested, parted with the fund, the Court held them liable.

In this case the act of the wife was clearly not authorized by any power, and was not binding upon her, having been done while under coverture. It was submitted therefore that the plaintiff was entitled.

[*Cocker v. Quail*(c) was also cited.]

Then it was said that the real assets of Thomas Dewell were not liable after the decree, but it was submitted that the decree discharged the executors only. The plaintiff, therefore, was not incapacitated by the decree in the administration suit from instituting the suit. Any creditor who has not come in under a former decree may follow the assets in an independent suit: *Gillespie v. Alexander*(d), *Greig v. Somerville*(e).

Again, the Statute of Limitations does not run against a woman under the disability of coverture, nor can a married woman be charged in equity with laches or acquiescence. By the 13th section of the 23 & 24 Vic. c. 38, the 40th section of the 3 & 4 Wm. 4, c. 27, is extended to cases of claims to the estates of intestates,

(a) 2 Phill. 73.

(b) 2 Russ. & M. 86.

(c) 1 Russ. & M. 335.

(d) 3 Russ. 130.

(e) 1 Russ. & M. 333.

1863.
CRESSWELL
v.
DEWELL.
—
Argument.

1863.
 CRESSWELL
 v.
 DEWELL.
 —
Argument.

and such claim is brought within the 16th section of the latter Act.

Mr. *Greene* and Mr. *Hemming* for the defendant.—The plaintiff had the benefit of the money; she signed the memorandum, and concealed the transaction during her husband's life. This conduct amounted to fraud, which disentitled her in this Court to any relief: *Savage v. Forster*(a).

But, secondly, the plaintiff had made her election, and could not now impugn the transaction. In *Barrow v. Barrow*(b), it was held that a married woman might elect so as to affect her interest in real property without deed acknowledged under the 3 & 4 Wm. 4, c. 74; and where she has elected the Court can order a conveyance accordingly, the ground of such order being that no married woman shall avail herself of fraud. [*Ardoise v. Bennet*(c) was also cited on this point.]

But, thirdly, the liability of Thomas Dewell in respect of the breach of trust committed by him was only a simple contract debt; his estate was not affected by any trust in respect of the same; and any proceedings against him in respect of such debt ought to have been brought within six years. If the plaintiffs had been proceeding as next of kin against the estate of Arthur Dewell, or as creditors against the estate of Philip H. Daniel, they might perhaps have had twenty years. But, having only six, the trustee is clearly barred; and the coverture of the widow does not save the bill, inasmuch as she is not the proper party to sue.

This, therefore, was a simple contract debt, and was barred by lapse of time: *Thorne v. Kerr*(d), *Fordham v. Wallis*(e).

(a) 9 Mod. 35. See *Erroy v. Nicholas*, where an infant party to a fraud was held bound. Ibid. 38.

(b) 4 K. & J. 409.
 (c) 2 Dick. 463.
 (d) 2 K. & J. 54.
 (e) 10 Hare, 217.

The bill, being in effect for the administration of real estate, ought to have been filed on behalf of the other creditors, and must to be dismissed.

1863.
CRESSWELL
v.
DEWELL.
—
Judgment.

The VICE-CHANCELLOR:—

Thomas Dewell was clearly guilty of a breach of trust in regard to that share of the personal estate of Arthur which was due to the trustees of the settlement of Mr. and Mrs. Daniel. What he did, having that share in his hands, was to hand it over to Daniel, who was merely the tenant for life; and, in order to secure himself against the consequences of that breach of trust which he well knew he was committing, he caused the wife of Daniel, who was the next tenant for life under the trusts,—not for her separate use while under the disability of coverture, to sign a document which recited this breach of trust, and recited that he had handed over the money to the husband. He induced her to approve of that transaction which deprived her of her life-interest in remainder. Moreover, he got her to give him an assurance that she would never come against him, or proceed against him to make him liable for this breach of trust.

All this happened in June, 1848. This lady, being under the disability of coverture, a memorandum of this kind set up against her claim, now that she has survived her husband, is, upon the settled principles of this Court, of no validity whatever.

No doubt she might have confirmed it when the disability of coverture was at an end. But no such case is shown. It is said she is barred by length of time; but not until 1862, upon the death of her husband, did she become entitled to apply to Dewell to pay her her life-interest under the settlement as due to herself. It appears, however, that Thomas Dewell, who had committed the gross breach of trust, died in 1853, and a suit was instituted for the purpose of administering

1863.
 CRESSWELL
 v.
 DEWELL.
 Judgment.

his estate. To that suit the present defendant, then an infant, was also defendant, and he appears to be the devisee of the real estate of Thomas Dewell. The whole of the estate of Thomas Dewell is liable to make good this gross breach of trust, and it is also perfectly clear that this lady is not barred by lapse of time, the case being one of an express trust. It is not pretended that the trustee, the present co-plaintiff, concurred in sanctioning that transaction. The evidence shows that he knew nothing about it; that he did not know that Thomas Dewell was dead, and never heard of these circumstances till after the year 1862. It is out of the question to say that this trustee is bound by it, because he was not a party to the breach of trust. It is equally out of the question to say that he is able to sue for this breach of trust merely as a simple contract creditor. In such a case the innocent trustee may properly come to the Court conjointly with the *cestui que trust*, who was the person substantially defrauded, and is the only person interested.

There must be a declaration that Mrs. Daniel, as *cestui que trust*, is entitled for her life to the dividends of that sum or amount which is stated in the memorandum. The present defendant in 1859, when he came of age, obtained, under the sanction of this Court, a conveyance of the real estate, which is the only part of the estate of Thomas Dewell now applicable to make good this breach of trust. On the principle expressed in *Greig v. Somerville*, and *Gillespie v. Alexander*, the right to go against that part of the estate which is subject to this debt seems perfectly clear; and there must be a declaration that the widow is entitled to a life-interest in that sum, and that it is a charge upon the real estate.

The decree was as follows:—

“ Declare that the payment to Philip H. Daniel of the sum of 696*l.* 19*s.* 8*d.* by Thomas Dewell was a breach of

trust, in respect of which the plaintiff Harriette Daniel is entitled to be indemnified out of his estate; and that as tenant for life under the settlement she is entitled to have what was due to her in respect of her life-estate in the said sum so paid and secured out of the real estate of the testator, which, by the indenture of July 25th, 1859, was conveyed to the defendant. Let an account be taken of what was due to the plaintiff Harriette Daniel in respect of her life-estate in the said sum under the above declaration, and let the chief clerk inquire and certify what sum ought to be invested in the Three per Cents. to secure to her payment of the dividends to which she is entitled in respect of her life-estate in the said sum. Tax plaintiff's costs, and let them be paid by the defendant Charles G. Dewell within fourteen days after the date of the certificate of the taxing master, or in default let the amount be paid or raised out of the real estate, with the amount certified to be due to the plaintiff Harriette Daniel as above; such last-mentioned amount to be invested; and with liberty to apply."

1863.
 CRESSWELL
 v.
 DEWELL.
 Judgment.

1863.

Nov. 12.

An heir-at-law cannot maintain a bill in the Court of Chancery to set aside, on the ground of fraud, a will devising real estates.

JONES v. GREGORY.

THIS was a demurrer to a bill filed by Thomas Jones, of Ross, heir-at-law of William Jones (the testator), against Jane Gregory and Thomas P. Little, who alone of the executors and executrixes named proved the will impeached by this bill.

The bill alleged that in the year 1840 William Jones was attacked by paralysis, and that in 1842, he was visited with a second and more violent stroke, which deprived him of the use of the left side of his body, and also of his speech, and very much weakened his mental faculties; that he died without issue on the 10th March, 1851, having continued from the time of his aforesaid illness until his death perfectly imbecile; that whilst he was so afflicted he resided at his house in the High Street, Stroud, up to his death, attended by his servants Elizabeth Taylor (deceased) and her sister and the defendant Jane Gregory, who were his sole and constant attendants; that these persons acquired so great an influence and control over him that he was subject to and in great bodily fear of them, and was obliged by them to permit them to attend to and regulate his business and affairs; and that during such time they used every endeavour, by misrepresentation and otherwise, to prejudice him unfavourably against his relatives.

Further, the bill went on to allege that in September, 1849, Elizabeth Taylor and the defendant Jane Gregory, expecting William Jones's death to be near, sent for Mr. Little, a solicitor, and either instructed the solicitor or unduly influenced or overawed the alleged testator William Jones in such a manner as to induce him to make

divers signs and sounds, which the solicitor believed to be, or Elizabeth Taylor and the defendant Jane Gregory interpreted to be, instructions to prepare a written paper purporting to be the will of the said William Jones, whereby, after directing the payment of his just debts, he gave, among other legacies, to his housekeeper E. Gregory, meaning E. Taylor, 7500*l.*; to his housekeeper Jane Gregory 5500*l.* He bequeathed all his furniture, &c., to Elizabeth Gregory, and gave to his trustees his real estate on trust for sale, and gave the residuc of his personal estate equally between E. Dike, S. Dike, Jane and Elizabeth Gregory.

The bill alleged that on the 29th September, 1849, Elizabeth Taylor and the defendant Jane Gregory caused three persons to attend as witnesses at William Jones's house, and in their presence guided his hand or otherwise assisted him to make a mark or signature to the said written paper purporting to be a will, and induced or overawed him so to do, he being at the time in the extremity of illness, and incapable of writing or speaking intelligibly, and utterly ignorant of or unable to comprehend the contents of the paper.

That one of the executors and devisees named in the will refused to act, and that the will was proved by the others. The bill went on to allege that two houses belonging to the testator had been purchased by Elizabeth and Jane Taylor, *alias* Gregory, and were vested in a trustee for them; that Elizabeth Taylor was since dead, and bequeathed all her property to the defendant Jane Gregory.

The bill charged that the said pretended will of William Jones was obtained from him by undue influence and misrepresentation, and was made and executed by him when he was not capable of exercising his judgment in such matters, and when he was bed-ridden and perfectly imbecile, and otherwise in such state of body and

1863.
JONES
v.
GREGORY.
—
Statement.

1863.
 JONES
 v.
 GREGORY.
 —
Statement.

mind as aforesaid, and that the same ought to be declared void for the purpose of passing real estate.

The bill alleged that the defendants threatened and intended, unless restrained, to sell the two houses, and to receive and get in and dispose of the rents and profits thereof; and prayed, first, that such part of the will as related to the two houses, High Street, Stroud, might be declared void and be cancelled, or, if necessary, an issue might be had or directed to try whether the freehold estates of the said William Jones were by the said pretended will devised or not, or that the plaintiff might be at liberty to proceed by ejectment; secondly, that the defendants might, if necessary, be restrained from selling the said houses, and from receiving the rents and profits thereof; and for a receiver, and for consequential relief.

Argument.
 —

Mr. *Bacon* and Mr. *Charles Hall*, for the demurrer, stated shortly the nature of the bill. His Honour then called on the other side.

Mr. *Harding* for the bill. — That this Court had formerly exercised the jurisdiction ascribed to it by this bill is clear, and the present Chancellor, when Attorney-General, in the case of *Boyse v. Rossborough*, expressed his opinion that the jurisdiction of this Court to set aside a will on the ground of fraud still existed: *Maundy v. Maundy*(a), *Goss v. Tracy*(b), *Welby v. Thornagh*(c), *Middleton v. Sherburne*(d), *Raworth v. Marriott*(e), *Hopwood v. Earl of Derby*(f), *Mudd v. Suckemore*(g), *Scaiffe v. Scaiffe*(h), *Boyse v. Rossborough*(i).

(a) 1 Rep. in Chan. 66.

(b) 1 P. Wms. 286-7.

(c) 1 Prec. in Chan. 123.

(d) 4 Y. & C. Ex. 358.

(e) 1 M. & K. 643.

(f) 1 K. & J. 255.

(g) 4 De G. & Sm. 13.

(h) 4 Russ. 309.

(i) 1 Kay, 71; 3 De G. M. & G. 817; 16 Ho. L. C. 2.

[The following cases were also cited: *Lord Donegal's Case*(a), *Pemberton v. Pemberton*(b), *Kerrich v. Bransby*(c), *Andrews v. Pouys*(d), *Bennet v. Vade*(e).

On the question of the receiver, several other cases were cited.]

1863.
JONES
v.
GREGORY.
Argument.

The VICE-CHANCELLOR:—

Judgment.

The authorities cited for the plaintiff show that this Court has no inherent jurisdiction to entertain a bill at the suit of an heir-at-law for the mere purpose of setting aside a will obtained by fraud.

It has been argued that more than a hundred years ago such a jurisdiction was, by judges of great authority, said to exist. It is proposed that I should treat this jurisdiction as having been latent, and should now set it up as against the authorities cited. I have no power to do that. It would be in vain for me, even if I desired it, to attempt to set up such a jurisdiction against the decisions of judges of the highest authority. I was struck with the fact that it is only recently, by a decision of one of the Vice-Chancellors, and by a decision of the Court of Appeal, that this Court has, at the suit of a mere legal devisee, entertained jurisdiction simply to establish a will. That decision was questioned at the time by some lawyers of experience and authority. I was not one of those who felt dissatisfied. It seems to me a

(a) 2 Ves. sen. 408.

(b) 13 Ves. 290.

(c) 7 Bro. P. C. 437. In *Middleton v. Sherburne*, 4 Coll. Ex. 378, Lord Abinger says, "*Kerrich v. Bransby* is treated as an authority that a will cannot be set aside in equity for fraud; this is an imperfect statement. * * *Andrews v. Pouys*, 2 Bro. P. C. ed. Toml. 504, is usually cited to show that a Court of Equity will

hold no jurisdiction to set aside a will of personalty; yet it may be cited to show the very reverse," p. 380. In *Boyse v. Rossborough*, 1 Kay, 83, V. C. Wood treats *Kerrich v. Bransby* as having finally put an end to the jurisdiction of the Court of Chancery to set aside wills on the ground of fraud.

(d) 2 Bro. P. C. 504.

(e) 2 Atk. 324.

1863.
JONES
v.
GREGORY.
Judgment.

useful jurisdiction; and if I were at liberty to make the law, and to disregard the decision of judges who have sat in this Court during the last hundred years, I might be disposed to think that it would be very beneficial to the public, and a proper thing, that this Court, which entertains jurisdiction to adjudicate upon questions of fraud as to other instruments, should also assume a jurisdiction to decide questions of fraud as to wills, whether of real or personal estate. But, there being no authority for such doctrine, I cannot act upon it. As to that part of the prayer of the bill which prays for a receiver and an injunction, it is not supported by any allegation as to the necessity of preserving the property pending litigation. There is no allegation in the bill which would justify the Court in entertaining such a case as it attempts to set up. Therefore, I am bound to allow this demurrer.

Leave to amend refused.

. 1864.

BARGENT v. THOMSON.

Nov. 9.

THIS bill was filed by Mrs. Bargent, and it prayed that the defendants, who were tenants in common in fee simple of certain messuages and premises situate in High Street, Eton, might be restrained from prosecuting the action or actions commenced by them, and from commencing or prosecuting any other action or proceedings to recover possession of the said demised premises or any part thereof, by reason or on account of a forfeiture by the non-compliance by the plaintiff with the therein-mentioned notice of the 16th September, 1862.

The bill stated that Richard Bargent, the late husband of the plaintiff, became the lessee of the premises in question for a term of twenty-eight years, under an indenture of lease dated the 22nd October, 1846.

The lease contained a covenant on the part of the said R. Bargent, his executors, administrators, and assigns, that he would from time to time, and at all times as often as occasion should require, well and sufficiently repair, &c., the premises by the said indenture demised; and also that it should be lawful for the said lessors, at all reasonable times, to enter into and upon the said premises to view and see the condition of the same, and of all defects and want of reparation then and there found to give or leave notice in writing for the said R. Bargent, his executors, administrators, and assigns, to repair, amend, and make good the same within the space of three calendar months then next ensuing, within which time the said R. Bargent, his executors, administrators, or assigns, should and would repair, amend, new-make, paint, and make good the same. And it was further agreed that,

Where a lessor brought ejectment for breach of covenant to repair within three months after notice, it appearing that out of twenty-two items twenty had been proceeded with, and fourteen completed; that the works had been partially delayed by weather, and that no further remonstrance had been made by the lessors—the Court restrained the action, and directed an enquiry whether the covenants had been performed.

1862.
BARGENT
v.
THOMSON.
—
Statement.

“ if the said R. Bargent, his executors or administrators, or his or their assigns, should not in all things well and truly observe, perform, fulfil, and keep all and singular the covenants and agreements therein contained, on his and their part to be observed and performed, &c., it should be lawful for the said lessors, &c., to re-enter, &c.”

The bill alleged that R. Bargent entered and expended a considerable sum upon the premises. He died in 1853, and the present plaintiff became his sole personal representative.

Mrs. Bargent let the premises to the persons now in possession. The bill alleged that on the 16th September, 1862, she received a notice in writing requiring her to perform certain repairs to the said premises, according to a schedule or specification of dilapidations annexed to the notice, made by the defendant's surveyor on the 8th September, 1862. The bill alleged that the schedule contained twenty-two items, many of which were expressed in very vague and comprehensive terms, and comprised works which the plaintiff was not, by the covenants in the lease, bound to do.

The bill alleged that immediately on receiving the notice from the defendants the plaintiff employed a builder to put the whole of the premises in a state of thorough repair, so far as related to the carpenter's work necessary to be done; and that the works were commenced and completed before the 16th December. That at the same time the plaintiff employed a bricklayer and plasterer to do all the necessary bricklayer's and plasterer's work, but owing to unfavourable weather a portion of the work remained incomplete. The bill alleged that the whole of the repairs were completed by the end of the second week in January, 1863.

The bill alleged that on the 18th December the defendant E. T. Thomson called upon Mrs. Bargent, and saw that some works were in progress. His demeanour was

very friendly, and he said, "I am not come on business this time."

On the 20th December, 1862, the plaintiff, to her great surprise, received a letter from the defendant's solicitor informing her that he was instructed to point out to her that "by her omission to repair according to the notice her lease had become forfeited, and that it had therefore been deemed advisable to obtain possession of the premises comprised in it." The letter proceeded to add that "it was fair to infer from the steadfast determination she had shown to disregard the notice that she intended to forfeit the lease, and he therefore presumed that she was ready to deliver up possession at once." In case of non-compliance he threatened her with legal proceedings.

The plaintiff placed the matter in the hands of her solicitor, who, on the 22nd December, 1862, wrote to the defendant's solicitor, stating that the plaintiff, after receiving the notice, had proceeded with the repairs, and that they were then substantially completed; but that the weather had occasioned unavoidable delay; that the premises had been repaired according to the covenant, and that there was no reasonable ground of complaint.

On the 30th December an action of ejectment was commenced against the plaintiff and the parties in possession.

The breach alleged was the not completing the repairs required by the notice on or before the 16th December.

The bill alleged that between the 16th September, when the notice was given, and the 30th December, on which day the writ was issued, no person ever visited or inspected the premises on behalf of the defendants for the purpose of examining and reporting on their state and condition.

On the 8th January the plaintiff's son tendered on her behalf a quarter's rent to one of the defendants, but he objected to accept it, and in course of conversation re-

1864.
BARGENT
v.
THOMSON.
Statement.

1864.

BARGENT

v.

THOMSON.

Statement.

specting the action said, "What we are going to try is the time in which you ought to have done the repairs." And further added, "We say you did not repair within the three months, and that the lease is forfeited, and we are determined to try it out."

Argument.

Mr. *Craig* and Mr. *Haviland Burke* for the plaintiff.— This is a case in which the covenant has been performed within reasonable time, the delay having been solely occasioned by the weather.

But here the lessor's conduct misled the plaintiff. It would be a monstrous thing if a lessor were to be allowed to take advantage of the rule of the Court not to relieve against neglect to repair, to mislead his lessees, and then have the benefit of a forfeiture committed under such circumstances. [*Bamford v. Creasy* (a); 22 & 23 Vic. c. 35 sections 4 to 9, were referred to. See also *Page v. Bennet* (b).]

Mr. *Bacon* and Mr. *C. T. Simpson* for the defendants.— This was the simplest case in the world. The bill asked for relief against a forfeiture for non-repair, which it was perfectly well settled this Court would not grant: *Hill v. Barclay* (c), *Gregory v. Wilson* (d). It was not denied that three months was ample time to complete the repairs if the plaintiff had made the best use of it. That she did not was her fault. The bill must be dismissed with costs.

Judgment.

The VICE-CHANCELLOR:—

The bill in this case is filed upon an equity which has always been recognised in this Court—that of a tenant who has bound himself by covenants to repair, and who can show to the Court equitable circumstances sufficient

(a) 3 Giff. 675.

(b) 2 Giff. 117.

(c) 18 Ves. 56.

(d) 9 Hare, 683.

to entitle him either to a relief from a strict performance of the covenants, or to ensure him against a forfeiture of the lease by reason of neglect to perform them. In this case, taking it upon the statement of the defendants themselves, it appears they gave notice upon the 16th September to make certain repairs according to a specification within three months from the date of the notice. Those three months expired on the 16th December. No one was sent in the capacity of a surveyor—not even the person whose specification bound the plaintiff—to examine the premises and see whether the repairs had been completed within the time mentioned in the notice. But one of the defendants (the lessors), on the 18th December, two days after the three months had expired, went upon the premises, and (without informing the plaintiff that he had come to take notice of the state of the works) found that out of twenty-two items two had not been commenced and six not completely finished. There was no objection taken by him as to the rest, and, without complaining or sending the plaintiff further notice to complete the repairs, he went back, and twelve days after issued a writ in an action of ejectment, on which he claimed to eject the plaintiff for the non-performance of the covenant to repair.

The case made by the plaintiff is that she proceeded to repair, but that the repairs were delayed by the state of the weather. No notice was given to the plaintiff to remind her that the repairs ought to be expedited, but this action was commenced, and long affidavits have been read containing conflicting evidence as to the state of the weather. The Court cannot approve of the conduct of a lessor who acts in this way. It would be an extremely harsh thing, while out of twenty-two items, all except two, relating to out-of-door work, have been proceeded with, and all but eight entirely completed, to eject a tenant and not to give the relief asked.

1864.
BARGENT
v.
THOMSON.
—
Judgment.

1864.
BARGENT
v.
THOMSON.
Judgment.

The Court, no doubt, is bound to respect the obligations contained in a lease, and to hold an even hand between landlord and tenant. Tenants are expected to perform the covenants in their leases, and the Court will not permit a tenant to evade the stipulations he has entered into. But, if he honestly endeavours to perform them, the Court will not allow the lessor to insist upon an omission of a day, unless there be something in the covenants that makes time of the essence of the contract. I think the defendants in this case proceeded with undue precipitation, and I by no means approve of their conduct. The commencement of the action was a harsh and severe proceeding; and going on with it down to the notice of trial, after an offer had been made, was still more so. Besides, there were two actions, one against the lessee herself, and the other against the persons in possession. The mortgagees very properly kept themselves aloof from this indiscreet litigation. The plaintiff filed this bill because of the notice of trial, and because there was no choice left but either to come here or go before a jury. On the very day upon which the bill was filed the plaintiff in equity offered to forego her costs, both at law and in equity, if her offer was accepted. I have heard no good reason why that offer was rejected. There must be an inquiry whether all the repairs have been executed according to the covenant, if the defendants wish for it. The injunction must be continued.

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1863.

DEPREE v. BEDBOROUGH.

Dec. 3 & 4.

ON the 26th February, 1863, certain leasehold property in the Haymarket, London, was offered for sale under the decree of the Court.

The 15th condition was as follows :—

“That if any purchaser shall not pay his purchase-money at the time above-mentioned, or at any other time which may be named in any order for that purpose, and in all other respects perform these conditions, an order may be made by the said judge at chambers for the resale of the premises purchased by such purchaser, and for payment by him of the deficiency, if any, in the price which may be obtained upon such resale, and of all costs and expenses occasioned by such default.”

Mr. Boucicault attended the sale and bid at the auction, and the property was knocked down to him at the sum of 9160*l*. He paid the required deposit amounting to 916*l*. into court, and signed the contract. By the chief clerk's certificate, dated 5th March, 1863, he was found to be the purchaser, at the sum of 9160*l*. Before the time fixed for the completion of the contract Mr. Boucicault became bankrupt, and his assignees elected not to complete the contract.

Mr. Boucicault alleged that he bid at the auction, on behalf of the New Theatre Company, Limited.

The vendors, on the election of the assignees not to complete, served a notice of motion upon the assignees that the premises might be resold, and that such might be without prejudice to any right which the vendors might have against the bankrupt or his assignees for any deficiency which might arise, in case the amount

At a sale under a decree by the Court, the conditions provided that in case of non-payment of the purchase-money or other default, there should be a resale, and the deficiency, if any, to be made good by the purchaser, but containing no stipulation as to the return or forfeiture of the deposit. The purchaser paid the deposit, and afterwards became bankrupt, and the assignees having declined to complete, the Court held the deposit forfeited.

Where the purchaser makes default, no express stipulation is necessary to entitle the vendor to the deposit :
Semble.

1803.
 DEFREE
 v.
 BEDBOROUGH.
 —
 Argument.

realised should be less than the sum bid by Mr. Bouci-cault.

Mr. *Bacon* and Mr. *Leigh Pemberton*, on behalf of the vendor. The purchaser having made default, the deposit is forfeited, without any express stipulation as to forfeiture. It is forfeited from the nature of the thing, because, having made default, he is incapacitated from suing at law or equity to receive it. The amount was paid on a contract, but how can a purchaser, alleging that he has violated the contract, ask to have the amount repaid to him which he can only allege to be his property, in consequence of his own wrong. In *Lethbridge v. Kirkman* (a), a purchaser, having paid the deposit, refused to complete on the ground that the title was bad, and brought an action to recover the purchase-money, the estate having been sold at an advanced price; but the Court, being of opinion that the title was good, gave judgment for the defendant. That case was an express authority on the point now raised, and was approved of by Lord St. Leonards(b). [*Cleave v. Moors*(c), was also cited.]

Mr. *Malins* and Mr. *Swanston*, for the assignees.—It is

(a) 25 L. J. N. S. Q. B. 80.

(b) V. & P. 14th ed. p. 41.

(c) 3 Jurist, N. S. 48, cited in Sugden, V. & P. 14th ed. p. 41. In *Lethbridge v. Kirkman* it does not appear from the report, whether the condition provided for the resale and for the purchaser's making good any deficiency that might be occasioned on such second sale. The only point argued seems to have been the question of title. In *Cleave v. Moors*, the report does not show whether there was any condition as to the purchaser making good the

deficiency that might arise on a second sale. The point argued appears to have been only whether the auctioneers, having the purchaser's I. O. U. for the deposit, could sue the purchaser upon it. The Court held they could. The case of *Casson v. Roberts*, 31 Beav. 613, before the Master of Rolls, was decided on the ground that the contract for the sale of land, being verbal, could not be enforced, and that the deposit consequently was recoverable by the purchaser.

not necessary to contend that, in the absence of any condition providing for the default made by the purchaser, the deposit would not be forfeited. The cases cited were of that kind, but this case differs from any of those cited, inasmuch as here there is a distinct remedy given to the vendor. In case of default by the purchaser, there is to be a resale, and the deficiency, if any, is to be made good by the purchaser. What more can the vendors want? Lord St. Leonards on this subject, referring to the case of *Palmer v. Temple* (a), speaks as follows (b):—"Where there is no specific provision, the question whether the deposit is forfeited depends on the intent of the parties to be collected from the instrument. Therefore, where 300*l.* was paid by way of deposit and in part of the purchase-money, and the agreement stipulated that if either party should refuse to perform the agreement, he should pay to the other 1000*l.* as liquidated damages, it was held there should be no other remedy. Consequently, though the purchaser had made default, and the vendor might have sued for the penalty and recovered damages, yet as he had sold the estate to another the purchaser was allowed to recover the deposit." Lord St. Leonards goes on to say, "the general question whether one contracting for the purchase of landed property, who refuses to complete his contract, may recover the deposit from the vendor on his afterwards selling the property to another, was not decided in that case; but the impression of the Court seems to have been that the deposit would not be forfeited by a breach of the contract on the part of the purchaser, *unless there is a clause to that effect in the contract*. In this case there is no stipulation as to forfeiture, and there is a clause which shows the intention was that there should be no forfeiture, and which

1863.
DEPREE
v.
BEDBROUGH.
—
Argument.

(a) 1 Per. & Dav. 379—382.

(b) V. & P. 14th ed. 40, s. 79.

1863.
 DE'FREE
 v.
 BEDBOROUGH.

—
Argument.

gives the vendors an adequate remedy for the purchaser's default, which in this case was caused by events over which he had no control. Under these circumstances it was submitted the order must be refused.

Mr. T. Smith Osler appeared for a mortgagee.

Judgment.
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The VICE-CHANCELLOR:—

The question in this case has arisen in consequence of a contract entered into by *Mr. Boucicault*, through whose bankruptcy a new party to the suit has been introduced, who has a right to abandon or to go on with the contract. This shows that the 15th condition was not intended to apply to the case of a bankruptcy, because, in the case of a bankruptcy, the right of a resale, and the right of the parties prosecuting the suit to have the property resold, arise from other circumstances than those contemplated by this condition. Where a deposit is exacted by the Court as part of the contract to be entered into by the purchaser, the purpose for which it is exacted is one for the benefit of the vendor—it is exacted as some security for the performance of the contract; but where, after the payment of the deposit, and before the completion of the contract of sale and purchase, the incapacity of bankruptcy succeeds, and the person who has paid the deposit has no longer any right whatever, but his right has been transferred to another person, who has the right to go on or to abandon the contract, it is quite clear that in such a case there has been a default on the part of the purchaser. Then, how the person who is in default can, upon that default, and in consequence of that default, acquire any right to the money which was parted with as a security that there should be no default, it is difficult to conceive; and if it be difficult to conceive in any case that the person making the default can upon so doing acquire a right to the money which was deposited

1863.
DEPREE
v.
BEDBOROUGH.
—
Judgment.

as a security against a default, upon what principle can the assignees of that person, who have a new right, make any claim whatever; because they had a choice either to have the benefit of the purchase or to renounce it, and as soon as they made their election and renounced the purchase they abandoned the deposit? I am unable to follow the argument of the counsel for the assignees, that upon the abandonment there arises a right to have the security returned which was exacted to prevent the contract being abandoned on the part of the purchaser; and no case can be found to support that view—at any rate none has been cited to show that in a case like this a person making default has been held to be entitled to the security which he paid to prevent an abandonment of his contract. It seems to me that it would be a violation of principle to countenance any such claim as that now put forward on the part of the assignees. The passages cited from Lord St. Leonards' book have some application; but there is this peculiarity in this case—that this was a sale by the Court, and the Court, having exacted the payment of a deposit, has by its position of deposites a very large power as to the rights of any person who may in any shape make a claim upon it. I do not wish to be understood as laying down any general rule upon the subject; all I decide is, that the assignees have no right whatever to the deposit, and that by abandoning the purchase they have abandoned the deposit which relates to it; and, therefore, I cannot countenance the right of the assignees to this money in consequence of the course which they have taken. On the other hand, this notice of motion asks for a declaration of absolute forfeiture of the deposit. Now, there has not been a forfeiture by the bankrupt, but there has been a forfeiture by the assignees, if by anybody, from the course which they have elected to take. The proper course to follow now will be, not to determine more than

1863.
DEPREZ
v.
BEDBOROUGH.
—
Judgment.

that the assignees in bankruptcy have no right to the deposit; and even if upon a resale of the property it should fetch ten times the amount which Mr. Boucicault bid for it, I do not see that any right can be set up by the assignees to this deposit. On the other part of the motion, which asks that the vendors may be allowed to prove in bankruptcy against the estate of the bankrupt, I shall make no order, for the reason that the assignees of the bankrupt had a right to elect whether they would accept the contract or not, and they have exercised that right by abandoning the contract. In fact, the Court of Bankruptcy, in the exercise of its discretion, compelled the assignees to make an election. The substance of my decision is that these assignees have no right to be paid this deposit. To say there has been a forfeiture on their part does not exactly state my meaning; but, as some expression must be used, perhaps the word forfeiture is as good as any other that can be found. The order will be to the effect that, the assignees having declined to accept the contract, the deposit has been forfeited by them, and the property must be resold; but I will make no order as to the right of the plaintiff to be indemnified as to any deficiency against the estate of the bankrupt.

1864.

TRAIL v. BARING.

Jan. 12 & 13.

THIS bill was filed by three of the directors of the Reliance Mutual Life Assurance Society against the trustees and the secretary of the Provident Clerks' Mutual Life Assurance Association, and it prayed that it might be declared by the Court that a policy of assurance for 1000*l.*, dated the 18th May, 1861, granted by the plaintiffs' company, was fraudulently obtained, and that it ought to be set aside and delivered up to be cancelled; and that in the meantime an action which had been commenced by the defendants for the recovery of the sum of 1000*l.*, expressed to be assured by the policy, might be restrained.

A policy of insurance on the life of T., which one insurance company induced another, by way of re-assurance, to effect on the representation that they intended to retain part of the risk, which, however, they subsequently got rid of by a further re-assurance—Declared void.

In 1838 the International Life Assurance Society effected an assurance on the life of Mrs. Lydia Taylor for the sum of 5000*l.* In 1860 they re-assured the life with the Provident Clerks' for 3000*l.* In May, 1861, that latter company proposed to insure the life of Mrs. Taylor with the plaintiffs' office for the sum of 1000*l.*, which proposal was accordingly accepted.

Jorden v. Money, 5 H. of L. C. 185, considered.

The bill alleged that, in order to carry into effect the above arrangement, the secretary of the defendants' company, on the 10th May, 1861, called on the secretary of the plaintiffs' company at their office, and proposed on behalf of the defendants that the plaintiffs should take a part of their risk in the said life by way of re-assurance, alleging that the Victoria Office had agreed to undertake the risk to the extent of 1000*l.*, and that the defendants would themselves retain 1000*l.* He then proposed that the plaintiffs' society should undertake, by way of re-assurance, the risk of the remaining 1000*l.*, and stated that Lydia Taylor was alleged to be in the sixty-second year of her age; that she could not be re-assured, but that from the information the defendants had obtained the

1864.
TRAIL
v.
BARING.
—
Statement.

directors were satisfied that Lydia Taylor was a first-class life, and that they had accepted the proposal and granted the assurance for 3000*l.* upon that footing. The bill alleged that this verbal proposal of the defendants' secretary was entertained and accepted by the plaintiffs' secretary on their behalf (as alleged) upon the distinct understanding, expressed by the former, that the directors of his association had the fullest confidence in the goodness of the life, and that they would retain 1000*l.* as their proportion of the risk of the 3000*l.* Fully relying on the representations made by the defendants' secretary, the proposal was accepted, as the bill alleged, as a partnership risk by the society, without the usual investigation or inquiry into the age, health, or habits of Mrs. Taylor.

On the 18th May, 1861, the defendants' office paid to the society the sum of 79*l.* 13*s.* 4*d.* for the first year's premium on the re-assurance. In January, 1862, having, as the plaintiffs had since ascertained, been seriously ill, Lydia Taylor died suddenly, but the plaintiffs were not informed of her death by the defendants until the 21st May, 1862, by a letter from them. After her death the bill alleged that the plaintiffs discovered that the defendants, instead of retaining a risk of 1000*l.* on her life, which they had represented they would retain, had assured, by way of re-assurance, with the Victoria Office the sum of 2000*l.* instead of 1000*l.*, contrary to their representation to the plaintiffs; and that they had thus, by re-assurance, got rid of the whole of their liability in respect of the policy granted by them to the International Office.

After the receipt of the letter of the 21st May, 1862, announcing the death of Mrs. Taylor, further correspondence was carried on between the secretaries of both offices, which resulted in the refusal of the plaintiffs to pay the sum of 1000*l.* assured with them by the defendants, and consequently in October, 1862, an action was commenced against them by the defendants to recover the amount of the policy of insurance.

The bill, afterwards amended, was filed on the 21st November, 1862, and a notice of motion for an injunction was given, but it was arranged to stand over to the hearing of the cause.

The evidence on the part of the plaintiffs proved that it was the custom and understanding upon such re-assurances as the present (in the absence of a special stipulation to the contrary) that the office effecting the re-assurance should itself retain a substantial portion of the risk covered by the original assurance, and for the office by which the re-assurance is granted to dispense with the usual medical examination on their own behalf, of the person whose life is assured.

It was also proved that the directors of the Victoria Office had paid the 2000*l.* assured by them.

It appeared from the answer of the secretary of the defendants' company that he told the plaintiffs' secretary that the Victoria Office had offered to take 1000*l.* or more of such 3000*l.*, but that it was the intention of the Provident Clerks' Office to give the Victoria Office 1000*l.* only of such 3000*l.*, and to keep 1000*l.* This statement was strictly true in all respects, and the intention of the Provident Clerks' Office was then precisely such as he represented it to be. He then went on to state that he believed Mrs. Taylor was sixty-two years of age, that a fresh medical examination of her condition could not be had, and that his directors were satisfied that she was a first-class life.

This discussion took place on the 10th May, 1861, and the same day, in an acceptance which was made upon that representation in writing, the plaintiffs' secretary said:—"This office will join you in the risk upon the life of Mrs. Lydia Taylor to the extent of 1000*l.*"

It appeared that before the transaction between the plaintiffs and the defendants was completed the defendants had got rid of the risk.

1864.
TRAIL
v.
BARING.
Statement.

1864.
TRAIL
 v.
 BARING.
 —
Statement.

As to the practice of assurance companies Mr. Jellicoe, an actuary of great experience, gave the following testimonies:—

“Upon such re-assurances it is the custom and understanding, in the absence of a special stipulation to the contrary, that the office effecting the re-assurance shall itself retain a substantial portion of the risk covered by the original re-assurance, and for the office by which the re-assurance is granted to dispense with the usual medical examination on their behalf of the person whose life is assured, and to rely on the retention by such office of their fair portion of the risk as a guarantee of their good faith in effecting the re-assurance merely as a diminution of their risk on the particular life, and not for the purpose of getting rid of their liability on a life in which they have not confidence.”

It appeared from the evidence of the medical attendant of Mrs. Taylor that at about the time of the policy being effected in the plaintiffs' office Mrs. Taylor was not in good health. Shortly after the death of Mrs. Taylor the plaintiffs filed this bill asking that the policy for 1000*l.* might be declared void and be delivered to be cancelled.

Argument.
 —

Mr. *Bacon* and Mr. *Dauney* for the plaintiffs.

There is a clear case of misrepresentation of a material circumstance on which the plaintiffs relied when they accepted the policy. It was not necessary in order to vitiate the policy that the circumstance misrepresented should be material; the question was whether it was true or false—not whether it was material or not. *Anderson v. Fitzgerald* (a). In this case the representation that the defendants intended to share a part of the risk was of vital importance, because it was the only security the plaintiff had that the life was insurable.

[The VICE-CHANCELLOR—I think the burden lies on those who support the transaction.]

1864.
 TRAIL
 v.
 BARING.
 —
 Argument.

Mr. *Malins* and Mr. *Karslake* for the defendants.—There is a distinction between a statement of fact and a statement of intention. No doubt, a fact must be stated truly, whether material or not, and the case of *Anderson v. Fitzgerald* carried that doctrine a long way. But an erroneous statement of an intention, even supposing the statement in the case erroneous, which it was not at the time it was made, stands on a different footing. In *Jorden v. Money*(a) it was held, that to raise an equity of this sort there must be a misrepresentation of existing facts, and not of mere intention. In *Piggott v. Stratton*(b), the doctrine laid down in *Money v. Jorden* was considered and explained by Lord Campbell, and accepted as law. [*Loffus v. Maw*(c), *Montefiori v. Montefiori*(d), were also cited (e).]

Secondly, the case made by the bill is one of fraud, and, having failed, the bill must be dismissed with costs: *Wilde v. Gibson*(f).

(a) 5 H. of L. C. 185.

(b) 1 De G. F. & J. 33, 51.

(c) 3 Giff. 592.

(d) 1 Sir W. Bl. 303.

(e) In *Loffus v. Maw*, 3 Giff. p. 604, the Vice-Chancellor, in reference to the case of *Money v. Jorden*, says, "Although the decision in that case is no doubt binding, it cannot be considered as a reversal of the decision of the House of Lords in *Hamersley v. De Biel*, and the proposition attributed to Lord Cranworth in the printed report, that a statement or representation

of what a person intends or does not intend is not sufficient, seems irreconcilable with the decision of the House of Lords in *Hamersley v. De Biel*, 12 Cl. & Fin. 45, and with the law as laid down by all the judges of the highest authority. It is remarkable that the case of *Hamersley v. De Biel* was not referred to any of the law lords in the case of *Jorden v. Money*."

On the question of misrepresentation see *Rawlins v. Wickham*, 1 Giff. 355; s. c. 3 De G. & J. 304.

(f) 1 H. of L. C. 605.

1864.

TRAIL
v.
BARING.*Judgment.*

The VICE-CHANCELLOR :—

From the evidence of the defendants it appears that the secretary of the defendants' company represented that it was the intention of the defendants' company to retain a part of the risk. Mr. Jellicoe, an actuary of great experience, states that upon effecting a policy of re-assurance it is the usual custom for the office effecting such re-assurance to retain a part of the risk. This is precisely what the defendants' company represented they intended to do. The importance of such representation is beyond all question. The offer and the acceptance upon that representation took place upon the 10th May; but the policy was not then made, the contract was not completed, nor was any premium paid by the defendants' association until eight days after the representations were made and the offer accepted. But in the meantime (viz. upon the 15th May) the directors of the defendants' association made up their minds not to retain any portion of the risk, and not to have a contract for joining in that risk, but to transfer the risk to somebody else. That they made up their minds to do, and did, and it was upon the 15th May, before the policy was signed, that that change of intention took place. It was not merely a change of intention, but the transfer was then actually effectuated. The defendants retained no liability whatever. There was, therefore, a representation made which was material as an inducement to the plaintiffs' society to enter into the contract: at the time when the contract was perfected that was no longer a true representation. The change of intention which made that representation no longer true was either accidental or designed, and, no matter for what purpose, it was concealed from the plaintiffs, who had accepted the offer and executed the policy, and in pursuance of such acceptance were about to join in the risk. The plaintiffs, however, by the policy effected, were joining in no risk whatever

with the defendants' association. My opinion is, that upon every principle of the law of contract their policy is vitiated by the conduct of the defendants' secretary, however honest it may have been, whether from oversight or for whatever reason. There must be a decree that the policy be delivered up to be cancelled, and that the defendants must pay the costs of the suit, including the costs incurred upon the notice of motion for an injunction.

1864.

TRAIL

v.

BARRING.

Judgment.

1864.

Jan. 15.

SHAFTO v. ADAMS.

Bill by an expectant heir to set aside a post-nuptial settlement of real estate in expectancy, to trustees for his wife for life, remainder to pay annually 500*l.* to the children, remainder to herself for life, made while he was indebted, and on the suggestion of his wife's mother — Dismissed without costs.

The principle on which this Court acts in discouraging mortgages, sales, and dealings with expectant heirs of reversionary interests, has no application to a settlement by an heir in favour of his wife and children.

THIS bill was filed by W. H. Shafto, and it prayed, that a voluntary post-nuptial settlement of certain real estate to which the plaintiff under the will of his uncle was entitled, expectant upon the decease of his father and uncle, and which was executed by the plaintiff under the circumstances stated in the bill, might be set aside.

The bill stated that, shortly before the date and execution of the said settlement, the plaintiff, in consequence of differences which existed between himself and his wife, and his wife's mother Mrs. Eleanor Lee, left his residence, and for a short time took up his abode at an hotel in Plymouth, where he expected to be joined by his wife. His said wife, acting, as was alleged by the bill, not in accordance with her own feelings, but under the influence of her mother, refused to communicate with the plaintiff; that Mrs. Lee insisted that, previously to any communication taking place between the plaintiff and his wife, he should execute a settlement of his interest in real estate under his uncle's will. The bill alleged that subsequently Mrs. Lee's solicitor, accompanied by a Major Studdy, a friend of hers, called upon the plaintiff and represented that no reconciliation could take place between him and his wife unless the proposed settlement was made. The solicitor, as the plaintiff alleged, further stated that if the plaintiff attempted to sell his said reversionary estate he would not be able to obtain more than 100*l.* or 200*l.* for it, and promised that Mrs. Lee would, if the plaintiff made the proposed settlement, give him 60*l.* in cash, and settle 1000*l.* on the plaintiff's wife.

The bill alleged that in consequence of these represen-

tations the plaintiff agreed to execute the settlement, and was taken by Major Studdy on the 27th July, 1858, to the solicitor's private residence, who produced a deed ready engrossed, which he read over to the plaintiff, but without comment of any sort, and the plaintiff subsequently signed the same in the presence of the solicitor and Major Studdy. No other person was present at the execution of the said settlement. The solicitor retained possession of the deed. The bill alleged that prior to and at the date of the execution of the said deed the plaintiff was in pecuniary distress. No copy or draft of the settlement was previously perused by or on behalf of the plaintiff. Neither the plaintiff's uncle, the tenant for life, nor the plaintiff's father was consulted by the plaintiff with reference to the settlement, and the plaintiff was without any professional or other advice or assistance. The costs of the solicitor who prepared the settlement were paid by Mrs. Lee.

The bill alleged that, since the plaintiff's marriage and before the execution of his said settlement, his wife's mother, Mrs. Lee, had made some payments on his account, not exceeding the sum of 1000*l.*, which it had been arranged should be deducted out of the money to which his wife would be entitled on her mother's death. That after the date of the settlement Mrs. Lee under her covenant had paid, for the separate use of the plaintiff's wife, interest on the sum of 1000*l.*, but that he had never received from Mrs. Lee's solicitor, or any other person, the sum of 60*l.* The plaintiff further alleged that at the date of the settlement the annual rent of the lands comprised in the settlement, in which the plaintiff was entitled for life in expectancy, subject to a charge of 3089*l.* 17*s.* 5*d.* and certain annuities, exceeded the sum of 38,000*l.*, and that the value of his life interest therein was 16,000*l.* at least, but of which fact he was at that time in complete ignorance.

1864.
SHAFTO
v.
ADAMS.
—
Statement.

1864.
SHAFTO
v.
ADAMS.
—
Statement.

The indenture in question was dated the 27th July, 1858, and made between the plaintiff of the first part, Mrs. Lee of the second part, and William Frederick Beadon (since dead) and John Adams of the third part. After reciting that an estate in fee simple had been devised to the plaintiff's uncle for his life, remainder to the plaintiff's father for his life, remainder to the plaintiff for his life, with remainder to his first and other sons and their respective issue severally in succession in tail male as therein mentioned; and reciting that Mrs. Lee had since the plaintiff's marriage made considerable payments for his benefit; in consideration of such payments, and of Mrs. Lee's covenant thereafter contained, the plaintiff granted unto the said trustees, their executors, administrators, and assigns, all that his interest in the said property expectant upon the several deceases, or other determination of the estates of his uncle and father as aforesaid. To hold the same for a term of ninety-nine years if the plaintiff should so long live, upon trust that the said trustees should, as soon as the plaintiff should become entitled to the receipt thereof, become and stand possessed of the rents and annual profits of the hereditaments comprised in the said term during the joint lives of the plaintiff and his wife, to pay the rents and profits thereof to the wife for her separate use, with a restriction on anticipation, and after her death during the life of the plaintiff out of the said rents and profits to pay the annual sum of 500*l.* for the maintenance and education of the children of the plaintiff and his wife, in such shares and manner as the said trustees should in their discretion think proper, and that the trustees should pay the residue of the said rents to the plaintiff and his assigns; then followed trusts for the maintenance, education, and advancement of the children, with a provision that the non-applied accumulations should be in trust for all the children in equal shares, with an ultimate trust in favour of the plaintiff.

It was by the said indenture witnessed that, in consideration of the grant of the said hereditaments by the plaintiff thereinbefore contained, Mrs. Lee covenanted with the trustees that she, her heirs, executors, and administrators, would forthwith pay to them the sum of 1000*l.*; and in case the said sum should not be paid forthwith, to pay interest for the same at the rate of 5*l.* per cent. per annum. And it was also agreed that the trustees should stand possessed of the said sum of 1000*l.*; upon trust to allow the same to remain due on the covenant of Mrs. Lee, or compel payment thereof and invest the said sum when so paid in or upon the securities thereinbefore mentioned, and pay and apply the annual income of such investment for the benefit of the plaintiff's wife, for her separate use for life, and without power of anticipation; and after her decease to apply the same and the annual income arising therefrom upon the trusts thereinbefore declared with respect to such part of the said sum of 500*l.* as might be so accumulated as aforesaid; but in case there should be no child to take the same, then upon trust for Mrs. Lee, her executors, administrators, and assigns.

The defendant was the surviving trustee of the settlement in favour of the wife and children of the plaintiff. The bill offered to repay to Mrs. Lee all payments made by her under the covenant aforesaid for the benefit of the plaintiff's wife.

Mr. *Bacon* and Mr. *F. T. White* for the plaintiff.

This was a settlement by an expectant heir at a time when he was greatly embarrassed, and under the influence of his wife's mother. It was made when the plaintiff was ignorant of the real value of the property, and was not in the usual form which would have given the husband the first life estate. In *Cooke v. Lamotte* (a), where an

1864.
SHAFTO
v.
ADAMS.
—
Statement.

Argument,
—

1804.
 SHAPTO
 v.
 ADAMS,
 —
Argument.

aunt was induced by her nephew to give him a post obit bond, the Court set it aside. [*Hoghton v. Hoghton* (a), *Archer v. Hudson* (b), and *Jenner v. Jenner* (c), were also cited.]

Mr. *Malins* and Mr. *C. Hall*, for the wife and children, were not called upon.

Mr. *Karslake* appeared for the trustee.

Judgment.
 —

The VICE-CHANCELLOR:—

Independently of the question of purchase, this bill cannot be sustained. There is no authority or intelligible principle upon which this Court can interfere at the instance of a husband to set aside a settlement made by himself in favour of his wife and children. In this case an attempt is made to set aside the settlement upon the ground of the husband being an expectant heir. His being an expectant heir is no reason why he should not make such a settlement as this. The principle upon which this Court acts in discouraging mortgages, sales, and dealings by expectant heirs of their reversionary interests has no application to the case of an expectant heir who has made a settlement upon his wife and children. The bill must be dismissed, but without costs.

(a) 15 Beav. 278.

(b) 2 Giff. 232.

(c) 7 Beav. 551.

1864.

COPPARD v. ALLEN.

Jan. 20 & 21.

THE bill in this case was filed by Thomas Coppard, of Henfield, Sussex, on behalf of himself and all other the unsatisfied creditors of the defendant Richard Gates, a brewer and farmer at Horsham, in Sussex, and prayed that the trusts of a deed of inspectorship executed by him for the benefit of his creditors might be carried into effect under the order of the Court.

The bill also prayed for an account against the defendant Alfred Allen, who was one of the inspectors under the deed, and that he might be charged with what, but for his wilful neglect and default, he might have received.

The bill alleged that the plaintiff had made numerous applications to the defendant for an account of the state of the assets. The defendant's solicitor had, after repeated applications, sent to the plaintiff a statement of account; but the defendant Allen positively refused to give any assistance in verifying such statement.

The bill further alleged that the defendant Allen had retained in his own hands a large sum, being part of the proceeds of the estate, and that he claimed to be paid a considerable amount for his services, and to be allowed sundry payments, for which he had no proper vouchers.

The deed was dated the 31st August, 1851, and was made between Richard Gates of the first part; Fielder King, James Rhodes, and the defendant Allen of the second part; and the several creditors of Gates who might execute the same of the third part. It recited that, at a meeting of Gates's creditors, it was represented to them by him that it would be for their benefit if his stock in trade and effects were got in and realised from time to time, and not by a forced sale; and it was there-

On a bill by a creditor against an inspector under a deed for the benefit of creditors, who had neglected to act on the provisions of the deed as to getting in the debtor's estate, the Court decreed an account against the trustee for wilful default, with annual rests and interest, and for the costs of the suit.

The Court will treat inspectors with reasonable indulgence, but at the same time will require of them reasonable diligence in performing the duties prescribed and undertaken.

1864.
COPPARD
v.
ALLEN.
—
Statement.

fore agreed that a year should be given to the said R. Gates to collect, get in, and dispose of his estate under the inspection of the three persons parties thereto of the second part. It was thereby witnessed that the parties thereto of the third part granted to Gates licence to conduct and manage the affairs of his trade and business as a brewer and farmer, and to collect, get in, and dispose of his stock in trade, estate, and effects, under the inspection of the three inspectors, until the 30th August, 1852, if he (Gates) should so long live, and observe the covenants therein; and covenanted that the parties thereto of the third part would not during the time aforesaid sue the said R. Gates, nor attach his estate.

Gates for his part covenanted with the three inspectors, and with the creditors parties of the third part, when required by the inspectors, to make out in writing a true account of his debts, property, and effects, and of the several incumbrances thereon, and to use his best endeavours to collect and get in the same for the benefit of his creditors; and from time to time, when any money should have been received by him sufficient to pay 2s. 6d. in the pound upon the debts, to pay and distribute the same unto and amongst his creditors, and so from time to time until all his debts should be paid; and until such payment to deposit the moneys received by him with the Branch London and County Bank at Horsham, to an account to be opened for the purposes of the said estate, or otherwise dispose thereof as the three inspectors should from time to time direct.

The deed further provided that if, by reason of any unforeseen cause, any delay should take place in the final settlement of the affairs of the said Richard Gates, so as to prevent his creditors from receiving the full amount of their debts at or before the expiration of a year, the inspectors might prolong or extend the time for the further

space of another year. The deed contained also a covenant by Gates with the parties of the third part, that if, at any time during the said term or intended term, his trades or businesses should, in the judgment of the inspectors, become embarrassed or less adequate to answer the purposes thereby intended, he (Gates) would at the request of the inspectors convey and assign to them all the then unapplied residue of his estate and effects for the use and benefit of the said creditors, as the inspectors should require. It was further agreed that on any sale the surplus moneys to arise therefrom should be paid to the inspectors on trust to pay and divide the same among the creditors. Previously to the execution of the deed a meeting of the creditors took place, at which it was stated that the debts amounted to 35,000*l.*, of which 5493*l.* was due to the plaintiff. The assets were represented to be worth 25,000*l.*

At the date of the execution of the indenture by Gates, he was seised of real estate of considerable value, some of which was mortgaged. His other property consisted of stock in trade, book debts, furniture, &c.

The bill alleged that out of the moneys received by the inspectors large sums were paid by them to the mortgagees, but no dividend had ever been declared among Gates's general creditors. The bill further alleged that the inspectors had received sufficient property belonging to Gates to have paid a considerable dividend on all his unsecured debts, but that such property had been misapplied and wasted to a considerable extent; and that, but for their wilful neglect and default, they might have received considerable sums in respect of the outstanding debts due to Gates, and of other portions of his property, besides what they actually received, and that the defendant Allen ought to account for the moneys which might have been so received.

In 1854 James Rhodes, one of the inspectors, left the

1864.
 CORFARD
 v.
 ALLEN.
 Statement.

1864.
COPFARD
v.
ALLEN.
—
Statement.

country, and was still out of the jurisdiction of the Court. In 1861 Fielder King, another of the inspectors, died, and Allen had since acted as the sole inspector.

The defendant Allen, by his answer, averred that William King, solicitor, of Godalming, a brother of Fielder King, took upon himself the management of the affairs of the inspectorship, and, except as after mentioned, conducted the whole of the business. A portion only of the proceeds of the real and personal estate was paid to him the defendant, and, by reason of the said William King's refusal to deliver up the accounts to him, he was unable to state specifically the particulars of the estate. In the schedule he had set forth an account of the moneys received by him, showing a balance of 141*l.* 15*s.* 8*d.* only in his hands belonging to the general creditors. He claimed to retain certain sums in respect of a judgment debt of 1100*l.* The report sent by William King, in reply to the plaintiff's application, was prepared and sent without defendant's instructions; and he was unable to furnish a more complete account, owing to the papers and accounts being solely in the hands of William King, who had refused to deliver them up.

It appeared from the evidence of William King that he had only acted in realizing the estate as solicitor for Allen. He admitted that the schedule to the defendant Allen's answer was, to the best of his belief, inaccurate and defective. He had received the proceeds of the sale of some furniture for which he had not accounted, and he permitted Gates to retain other furniture, for which he was to pay 179*l.* 13*s.* 7*d.*, which he had not done.

An accountant, named Bolton, who was employed by Mr. William King, alleged that the first account furnished by Allen consisted of two items only on a slip of paper, which he rendered. Upon being pressed for further accounts, he sent in particulars of a claim for travelling expenses amounting to about 100*l.* When a further

account was furnished the witness, in a letter to William King, described it as bearing "evident marks of error, confusion, and stupidity."

1804.
COPPARD
v.
ALLEN.
—
Argument.

Mr. *Malins* and Mr. *Kay* for the plaintiff contended that this case was within all the authorities. The right to an account could not be disputed. It was equally clear that the defendant *Allen* was bound to make good all those sums which had been lost through his neglect.

The suit had been made necessary by his misconduct, and it was submitted he must pay the costs.

[*Springett v. Dashwood(a)*, *Kemp v. Burn(b)*, were cited.]

Mr. *Bacon* and Mr. *Rowcliffe* for the defendant *Allen*. — This suit is defective for want of parties. Both *Rhodes* and *King* acted, and, even assuming that *Rhodes*, who was out of the jurisdiction, could not be made a party, there was no reason assigned why the personal representative of *King* was not made a defendant.

But, secondly, this bill ought to be dismissed so far as it seeks to make the defendant *Allen* personally liable: he had no active duty to perform, and therefore he could have neglected none. The scope of the deed was that *Gates* should get in and realise the estate, and he covenanted to do so, but it would have been impossible to enforce that covenant. Then, where was the case of wilful default? The defendant was perfectly willing to account for all moneys received by him, and to vouch all payments which he claimed, and if the plaintiff wanted this relief he should have filed a different bill.

Mr. *Brooksbank*, for the defendant *Gates*, had offered to pay into court the sum of 150*l.* in respect of the fur-

(a) 2 Giff. 521.

(b) 4 Giff. 348.

1864.
 COFFARD
 v.
 ALLEN.
Judgment.

niture, and asked that the bill might be dismissed against him with costs.

The VICE-CHANCELLOR:—

It has been contended on behalf of Alfred Allen that, from the peculiar nature of the deed of inspection of the 31st August, 1851, there were no duties of any active kind imposed upon him, or that they were such that he was justified in pursuing the course he had taken.

The argument on his behalf has mainly been that there were no duties at all upon which this Court could fasten a trust, and that, inasmuch as there were no duties to perform, there could be no decree for the performance of them. If, however, there were duties to perform, and there has been no performance, that amounts to a neglect of duty, and upon the whole case it seems to me to be one in which there has been gross neglect on his part. The question is important, because in many cases of this kind, where the duties of trustees under deeds of inspection are involved, and when the trusts are for the benefit of the creditors, it too often happens that there is not that degree of diligence or that strict performance of the duties of the trusts which the interests of the creditors require. The Court is, I think, bound to treat persons acting as inspectors or as trustees with a reasonable degree of indulgence; but at the same time it will require of them a reasonable degree of diligence in the performance of their duties. There can be no doubt as to the duties which were to be performed in this case. The form of the deed left it merely in covenant that the whole of the property should be conveyed to and vested in trustees, in order that it might be sold and realised for the benefit of the creditors. The deed contains only a covenant to that effect, but the Court must hold that the

trustees were liable for the nonperformance of that covenant which it was their duty to enforce on the part of the debtor.

1864.
COPPARD
v.
ALLEN.
—
Judgment.

It is said that the covenant was not with them, but with the creditors, and if it were that is no excuse at all in a case of this kind. But, in fact, the trustees had, under this deed, power to require, if necessary, an assignment of the whole of the property of the debtor; but practically no conveyance of the property was necessary, because their dominion over it was never resisted by the debtor. Here there can be no doubt that the inspectors had duties to perform, and that the defendant had acted as inspector. Through the intervention of a solicitor acting for the inspectors, the property was in part received and realised; part of it was sold, and some of the outstanding debts were got in. All that was done in the execution of the powers conferred upon the trustees; and nothing seems to have been required for the actual and complete performance of the trusts, or to enable the trustees to get in the whole of the property of the debtor, Gates, who interposed no obstacle whatsoever to the performance of the trusts. The question is, how has the property been disposed of which was got in? It is clearly in evidence that it was got in with the knowledge and under the inspection and control of the defendant Allen. The bare fact that the balance, though it amounts to only about 150*l.*, has been, during a period of nine years at least, in the hands of the defendant Allen, and undisposed of by him, is evidence of neglect on his part. Another part of the evidence showing his neglect is, that the price of the furniture, though a sum not very considerable, yet of an amount sufficient to have made it the duty of Allen to get it in and hold it for the benefit of the creditors, has not been got in at all from the debtor, but still remains in his hands. It has been well

1864.
COPPARD
v.
ALLEN.
—
Judgment.

settled that, in the case of a bill for an account against a person in a fiduciary character, one act of neglect is sufficient to make him liable to a decree for an account, as for wilful neglect and default for what he might have received. But the neglect and misconduct of the defendant appears from the evidence of Mr. Bolton, the accountant and solicitor formerly employed by the inspectors, which is wholly inconsistent with the answer of the defendant Allen, of a gross description.

In this case this trustee is little entitled to the indulgence of the Court for his conduct. He has shown great neglect in the performance of his duties, and yet he has preferred claims against the trust estate to as great an amount as the utmost diligence on his part would have entitled him to do. It is objected that the defendant is only one of three trustees, and that the plaintiff ought not to have an account directed against him without bringing the other two trustees, Rhodes and King, or their representatives, before the Court; but Rhodes is out of the jurisdiction, and that is a reason for not having him before the Court; and King is dead, and I can see no reason why his representative should be made a party to the suit. It has been well settled that a *cestui que trust*, seeking an account against trustees for a breach of trust by one of the trustees alone, will be justified in bringing that one before the Court without the others. There is no difficulty presented in this case by the absence of the other inspectors, both of whom seem to have acted in the character of trustees. The plaintiff prays for costs up to the decree, and, looking at the defence of the defendant Allen, and the attitude he has assumed, I think that the plaintiff is entitled to the costs of the suit up to the date of the decree, and also that he is entitled to a decree for an account as for wilful neglect and default for what the defendant Allen might have received. As to Gates, he

has submitted to pay the 150*L*, which appears to be still on his hands, into court, and the order will be that he do pay the same within one month. In taking the accounts against the defendant Allen there must be yearly rests with interest at 5 per cent. upon the balances. Though it does not help the defendant's case that he was not more diligent in getting in the money which has remained in the hands of Gates, yet I can see nothing in Gates's conduct that entitles the plaintiff to a decree against him for costs.

1864.
COPFARD
v.
ALLEN.
Judgment.

WILLIAMS v. HEADLAND.

Jan. 23.

WILLIAM HEADLAND, the testator in the cause, bequeathed to the defendants Francis John Headland and Edward Headland, their executors, &c., all his personal estate upon trust, as to one-third thereof, to convey, assign, pay, and deliver the same to the separate use of the plaintiff Isabella Ann Williams; and as to the remaining two third parts, at their and his absolute discretion, to sell such parts thereof as should not consist of money or securities for money, mining, railway, or other shares or description of property not bearing interest, dividends, or annual produce, and to invest the same as therein mentioned, and stand possessed of the interest, dividends, and annual produce thereof, upon trust to pay the same to A. M. Headland for life, and after her decease to pay, transfer, and assign, assure and convey the said two third parts or shares of his said personal estate, and the stocks,

In an administration suit, the order of the Court is an indemnity to the executors.

In an administration suit, executors claimed to retain part of the residue as an indemnity against possible liability in respect of mining shares. The Court refused the claim, but required the residuary legatees to undertake to answer such liability.

1864.
 WILLIAMS
 v.
 HEADLAND.
 Statement.

funds, and other securities upon which the same might be then invested, unto E. M. Headland and C. Headland absolutely.

Testator died on the 3rd April, 1860. At his death he was possessed of shares in certain mines on which it was contended certain liabilities might arise.

The shares had been sold for 2s. 6d. per share, but had not been registered in the name of the purchaser; and the executors said that they were informed and believed that the testator's estate might be made liable for future calls.

Argument.

Mr. *Malins* and Mr. *Melville*.—This was a suit for the administration of the testator's estate, and any order for payment made by the Court is an indemnity to the executors. In *Waller v. Barrett* (a) the Master of the Rolls says, "Where executors have fairly placed all the circumstances before the Court and act under its order they will be indemnified against all future liabilities" (b). In *Bennett v. Lytton* (c) Vice-Chancellor Wood followed the decision of the Master of the Rolls. His Honour said (d), I rest my decision on the broader ground that executors who act under the direction of the Court will be protected, and that those who may afterwards dispute the propriety of the application must proceed against the legatees. What Vice-Chancellor Wood thought was the right ground for the creditor to take was actually taken in *Davies v. Nicholson*, where the creditor sued the specific legatee.

Mr. *Bacon* and Mr. *Toulmin*, for the executors.—The usual practice of the Court was to allow executors to retain a sufficient sum to indemnify them against risk. That was the invariable practice as to leases until the passing of the 22 & 23 Vic. c. 35. This case was not

(a) 24 Beav. 413.

(b) Ibid. 416.

(c) 2 J. & H. 155; *ibid.* 158.

(d) 2 De G. & J. 693.

provided for by the statutes ; all that the executors asked was to have £200 retained as an indemnity to them.

1864.
WILLIAMS
v.
HEADLAND.

The VICE-CHANCELLOR :—

Judgment.

In the case of *Bennet v. Lytton*, which has been referred to, Vice-Chancellor Wood appears to rest his order upon the broadest ground.

I cannot imagine anything more dangerous than to throw the least doubt upon the extent to which a decree of this Court is an indemnity to executors. If this Court orders a sum to be paid to an executor, or orders an executor to pay a sum, or takes it out of his hands, that order is, generally speaking, an indemnity to the executor. But the Court is always careful of the case of those who may have demands against the estate not at present made, or not at present appearing ; and for this reason, as Lord Cottenham long ago pointed out, the old practice of the Court was that every legatee, before he got payment of his legacy through a decree of the Court, was obliged to enter into a recognisance to refund in case demands should be made against the estate which did not then appear. That practice gradually got into disuse, but that course of the Court clearly shows that what the Court had in view was, not merely the indemnity of the executor, but care with reference to the rights of those who might have demands against the estate not then appearing, so as to preserve those demands against the assets in the hands of those who were to receive them from the Court. In the case of *Waller v. Barrett* the Master of the Rolls had before him a demand for an indemnity, in the shape of setting apart a specific fund to answer an apprehended breach of covenant in a lease. In that case the chief clerk certified, upon a reference for providing a proper indemnity, the case being one in which an indemnity was necessary, that recognisances by the legatees who were to receive the money out of court

1804.
 WILLIAMS
 v.
 HEADLAND.
 Judgment.

would be a sufficient indemnity, and so the Master of the Rolls held. In that case he reviewed the whole of the authorities, and showed very clearly the principle upon which the Court acts. I notice that case because it was one in which there was no decree for general administration—a case in which, therefore, the executors had not been indemnified by the order of the Court in the administration of the estate. It follows, from what he pointed out, that when the Court too implicitly follows a precedent a great deal of injustice is done, and more is done than is necessary with reference to the rights of those who may be entitled to demands against the estate, or than the proper indemnity of the executors requires. The general rule is, that what the Court orders to be done as to an estate is an indemnity to the executors, as the Master of the Rolls stated in the case of *Waller v. Barrett*. I do not mean that, where an executor is ordered to pay a sum in a suit which is not for the administration of the estate, it will protect him from creditors. But in a suit for the administration of an estate, if the Court orders him to pay money, that is a perfect security to him; for unless that were so it would paralyse the functions of this Court. Now, what I have to look to is, what is asked on the part of the executors, and what on the part of the legatees, and what it is proper for the Court to do. The case is one in which the apprehended liability is in respect of shares sold but not registered to the purchaser. It is impossible to say in such a case that there may not be some demand against the estate; and the liability of the executors is thus brought nearer and in a more urgent way than under other circumstances it might be. But to set apart a sum to answer the liability would seem to be a great injustice to the residuary legatee, and more than the executors upon any principle are entitled to ask. If, in this case the residuary legatee undertakes to make good any liability or to answer any demand that may be made in respect of

these sold unregistered shares, that is enough, in my opinion, to enable him to receive the money out of court. Unquestionably, the order of the Court, so far as the liability of the executors is concerned, is a complete indemnity, and I would not have it supposed that I entertain a moment's doubt about it.

1864.
WILLIAMS
v.
HEADLAND.
Judgment.

MERRYWEATHER v. JONES.

Feb. 24 & 26.

THIS bill was filed by Jane Merryweather, the wife of George Merryweather, by her next friend, and it prayed that the will of Merric Burrell, dated 1845, and the will of Elizabeth Burrell, dated 1856, the father and mother of the plaintiff, might be administered under the direction of the Court.

The bill also prayed that a post-nuptial settlement dated the 18th December, 1858, might be declared void, and that the trustees might be directed to transfer the trust moneys to the plaintiff, or to her husband in her right, freed from the trusts thereof.

At the date of the settlement the plaintiff was only eighteen years of age, and was married in 1856 to John Waterhouse, from whom, on her husband's petition, by a decree of the Divorce Court, she was divorced in 1861. In November, 1861, she married her present husband, George Merryweather. The only child of the first marriage was the defendant Alfred Clegg Waterhouse.

Bill by a divorced wife who had married again to set aside a post-nuptial settlement, executed while a minor, but subsequently confirmed, for the benefit of the wife for life for her separate use, remainder to her (first) husband for life, remainder among the children of the marriage, in default of children who attained twenty-one as the wife should appoint; with a proviso, if the husband and wife should live separate and

the wife should require alimony, that the wife's interest under the settlement should cease —Dismissed with costs so far as it sought to set aside the whole settlement, but the Court declared the proviso void.

1864.
MERRY-
WEATHER
v.
JONES.

Statement.

Under the will of her father Merric Burrell dated in 1845, the plaintiff was entitled to a share "freed from the debts, control, or interference of any husband with whom she might at any time happen to marry."

Under her mother's will dated in 1857 she was entitled to a share for her sole and separate use, independently of her present or future husband whom she might marry, not to be subject to his debts, control, &c.; her receipts to be a sufficient discharge.

By an indenture dated December, 1858, made between John Waterhouse of the first part, the plaintiff, therein described as his wife, of the second part, and two trustees of the third part, after reciting the will and death of Merric Burrell, and the death of Elizabeth Burrell, and that John Waterhouse and the plaintiff had agreed to and with each other to settle all the estate and interest of the plaintiff, or of John Waterhouse in her right under the will of Merric Burrell, upon the trusts therein mentioned, it was witnessed that in pursuance of the agreement, and in consideration of the premises, and for the nominal consideration therein mentioned, John Waterhouse and the plaintiff thereby assigned unto the two trustees, their executors, administrators. and assigns, all the estate and interest of John Waterhouse and the plaintiff, or of John Waterhouse in right of his wife, under the devises or bequests in the will of Merric Burrell, for the benefit of the plaintiff, upon trust to pay the annual proceeds thereof to the plaintiff during her life for her sole and separate use, and not to be subject to the debts and control of John Waterhouse, or any other person with whom she might after his decease intermarry, and that her receipts should alone be a sufficient discharge for the same; and after her decease in trust for John Waterhouse during his life, and from and after the decease of the survivor of them, in trust for the child or children of the plaintiff, in equal shares as tenants in common, with a trust over in

favour of the survivor in case any of the children should die under the age of twenty-one without having been married; but in case there should be no such child who should attain that age or be married, then in trust for such persons as she by deed or will (notwithstanding her then or any future coverture) should appoint, and in default of appointment in trust for such persons as, at the decease of the plaintiff, should be her next of kin, and entitled to the same under the statute for distribution of intestates' effects, as if the plaintiff had died unmarried and intestate.

The proviso was as follows:—"That if the defendant John Waterhouse and the plaintiff should, at any time after the execution of the settlement, separate and live apart, and if the plaintiff should, at any time during such separation, compel, or attempt to compel, John Waterhouse to pay or allow her during such separation any alimony, interest, or other sum or sums of money, then and in such case the provision thereby made for the plaintiff should cease and be at an end, and the defendant John Waterhouse should be entitled to the interest and annual produce of the trust fund in such and the same manner as if the plaintiff were then dead, any rules of law or equity the contrary notwithstanding."

It was also provided that the plaintiff should accept the provision and settlement thereby made in full satisfaction and discharge of all dower, thirds, or freebench, at law or in equity, to which she might become entitled in the real and personal estate of John Waterhouse.

By a deed of indenture dated the 16th May, 1859, made between John Waterhouse of the first part, the plaintiff of the second part, the trustees of the previous deed of 1858 of the third part, and the defendants Taylor and Booth of the fourth part, after reciting the indenture of 1858, and that the trustees thereof were desirous of being discharged, it was stated that in accordance with the power therein, and with the consent of John Waterhouse

1864.
MERRY-
WEATHER
v.
JONES.
Statement.

1864.
MERRY-
WEATHER
v.
JONES.

Statement.

and the plaintiff, they had appointed the defendants Taylor and Booth to be trustees in their place.

The bill alleged that the deed of 1859, which it was contended confirmed the deed of settlement of 1858, was prepared by the direction of John Waterhouse; that the plaintiff was not advised by any solicitor, and that she executed it under the representation that it was absolutely necessary that the former trustees should be discharged, and without any explanation of the deed, or knowledge that her rights would be affected thereby, and that if she had known that the same would have operated in any way to confirm the deed of 1858 she would have refused to execute it.

The bill alleged that the defendant Waterhouse and the trustees had taken possession of the property to which the plaintiff was entitled under the will of her father and mother, and refused to give the plaintiff any account of it. The bill also alleged that parts of the property had not been reduced into possession until after the dissolution of the plaintiff's marriage.

Argument.

Mr. *Kenyon* and Mr. *Hetherington* for the plaintiff.—The introduction of a clause such as that in this settlement was invalid, and vitiated the whole instrument. Independently of the clause in question the deed was invalid; it was a post-nuptial settlement made by a minor under pressure by her husband and without independent advice. The very clause which the defendants felt they could not defend showed that the plaintiff, when she allowed it to be inserted, could not be properly advised.

Then it was said that the settlement had been confirmed by the plaintiff, in 1859, but it was clear that the plaintiff was not properly advised and was not aware of what she was doing, and it was submitted that such an instrument could be of no avail in this court. [They cited on this

point, *Vansittart v. Vansittart* (a), *Westmeath v. Westmeath* (b), *Wells v. Malbon* (c), *Westmeath v. Salisbury* (d), *Stamper v. Barker* (e), *Durant v. Titley* (f), *Bond v. Taylor* (g).]

1864.
MERRY-
WEATHER
v.
JONES.

Argument.

Mr. *Malins* and Mr. *Karslake*, for the principal defendants, expressed their willingness to expunge the clause.

Mr. *Greene*, Mr. *Osborne*, and Mr. *Lake Russell* and Mr. *Erskine*, appeared for the other defendants, but were not called on.

The VICE-CHANCELLOR :—

Judgment.

This proviso is bad, and must be declared void.

The bill is filed by a lady, who while a married woman, by a post-nuptial settlement, settled the personal property to which she and her husband were unquestionably entitled absolutely, to her separate use, upon trust, first of all for herself for life, next upon trust in favour of the husband (who had a life-estate merely), and then upon trust for the children of the marriage; and in default of children there is a general power of appointment by the wife by deed or will, and in default of such appointment the property would go to her next of kin according to the statutes for distribution of intestates' estates, as if she had died unmarried. It is a perfectly rational settlement, and upon the face of it there could be no question as to its validity.

But is said that the plaintiff was an infant at the time she executed it. But here is a deed, dated in May, 1859, expressly confirming the settlement; and I am very glad that it does, because it precludes all question as to the plaintiff's right in this suit. The plaintiff appears as a

(a) 2 De G. & J. 249.

(e) 5 Mad. 157.

(b) Jac. 126.

(f) 7 Price, 577.

(c) 31 Beav. 48.

(g) 2 J. & H. 473.

(d) 5 Bligh, 339.

1864.

MERRY-
WEATHER

v.

JONES.

Judgment.

divorced wife of the defendant Waterhouse, and as the wife of another husband; and her prayer, if allowed, would put the property in the power of herself and her present husband, and they would be able to do what they pleased with it; and I have no doubt that if they had it in their possession they would not make so good a settlement as the one now before the Court. Therefore, as to that part of the bill it must be dismissed, and with costs, for this Court will not encourage persons to come forward as next friends of married women in order to set aside settlements upon such grounds as those alleged at the bar. Some person or other must pay the costs of this suit, and I shall order the next friend to pay them, excepting so much as relates to the provision for separation and alimony. Although the main purpose of the suit fails, it is maintainable as an administration suit, even after striking out the clause objected to, and which ought never to have been inserted, and which now becomes inoperative. So far as the bill seeks to set aside the whole settlement, it must be dismissed.

1864.

THORNTON v. FINCH.(a)

Nov. 25.

THIS was a motion by a judgment creditor of the defendant William Hazzard for an injunction to restrain the defendants, who were mortgagees of William Hazzard, from paying to the said William Hazzard any moneys they might raise by virtue of any power of sale contained in their mortgage security.

The bill stated that in 1859 and 1860 the defendant William Hazzard was the owner of a piece of land at Fisherton Anger, in the county of Wilts, and employed the plaintiffs to build four houses thereon for him, which they completed about August, 1860.

William Hazzard was then indebted to the plaintiffs for building those houses in a considerable sum, of which 804*l.* 18*s.* 7*d.* remained due to the plaintiffs in July, 1864.

The plaintiffs then commenced an action of debt against the defendant William Hazzard, in the Court of Common Pleas at Westminster, and recovered judgment thereon on the 4th August, 1864, for the said sum of 804*l.* 18*s.* 7*d.*, and 7*l.* 9*s.* 10*d.* for costs, and such judgment was duly entered up against the defendant William Hazzard in the Court of Common Pleas on the 4th August, 1864.

The said judgment was, on the 5th August, 1864, duly registered with the Senior Master of the said Court of Common Pleas.

The plaintiffs on the 7th September, 1864, caused a writ of *elegit* to be directed to the sheriff of Wiltshire, to be issued out of the said Court of Common Pleas upon the said judgment, against the goods and chattels, lands, tenements, and hereditaments of the defendant William Hazzard, in the said sheriff's bailiwick.

On a bill by a judgment creditor of a mortgagor, the Court granted an injunction to restrain mortgagees who were about to sell under their power from paying the surplus to the mortgagor.

The statute, sec. 1, does not apply to an equity of redemption.
Semble.

(a) This case has been published out of its order, as it is the first time the point has been raised.

1864.
THORNTON
v.
FINCH.
Statement.

Such writ of *elegit* had been duly registered according to the provisions of the Acts of the 23 & 24 Vic. c. 38, and 27 & 28 Vic. c. 112, and had been delivered to the sheriff of Wiltshire to be executed in due form of law.

At the time of the judgment being so entered up, and the said writ of *elegit* being so issued and delivered, three of the said houses and the ground on which they stood had been sold. At the same time the defendant William Hazzard was and is now seised in fee simple in possession, subject to the mortgage hereinafter mentioned, of the piece of land, containing about an acre in extent, on which one of the said houses so built by the plaintiffs as aforesaid is standing.

The defendant William Hazzard had at the same time, and has now, no goods nor chattels, and no other lands, tenements, or hereditaments within the bailiwick of the sheriff of Wiltshire.

The defendants Charles Herbert Martin Finch and Thomas Henry Edward Compton held a conveyance to them, made in August, 1860, by way of mortgage in fee of the whole of the said houses and land, and by virtue of the powers of sale in such mortgage they had sold the said three houses so sold as aforesaid, and they held all the deeds and documents of title relating to the said house and land remaining unsold.

The same defendants allege that there is still something due to them on their said mortgage.

By reason of the said deeds and documents of title being in the hands of the defendants Charles Herbert Martin Finch and Thomas Henry Edward Compton, the plaintiffs were impeded in procuring the sheriff to proceed with the further execution of the said writ of *elegit*; and if there is anything still due to the defendants Charles Herbert Martin Finch and Thomas Henry Edward Compton upon their mortgage, it was doubtful whether the said house and land could be delivered in execution to the plaintiffs by the sheriff under the said writ.

The defendants C. H. M. Finch and T. H. E. Compton intend forthwith by virtue of their power of sale to sell the said house and land, and allege that after such sale and the receipt of the purchase-money, and the retaining thereout of what they allege was still due to themselves, they intend to hold the balance of such purchase-money in trust for the defendant William Hazzard.

1864.
THORNTON
v.
FINCH.
Statement.

The defendants Charles Herbert Martin Finch and Thomas Henry Edward Compton ought not to pay such balance of such purchase-money to the defendant William Hazzard until he has satisfied the debt due from him to the plaintiffs on the said judgment.

The ninth and tenth paragraphs of the answer of the defendants Finch and Compton were as follows:—

9. "We admit that we intend forthwith, by virtue of our power of sale, to sell the house and land, and we expect very shortly to enter into a contract for that purpose. We are advised that after such sale and the receipt of the purchase-money, and the retaining thereout of what is still due to us, and our costs, charges, and expenses as mortgagees, we shall hold the balance of such purchase-money in trust for the defendant William Hazzard.

10. "We submit whether we ought or not to pay such balance to William Hazzard until he has satisfied the debt due to the plaintiffs on the judgment, and we submit the plaintiffs ought to obtain an order from the Court directing us not to pay it, in order to justify our not doing so."

Mr. *Batten*, for the plaintiff, now moved for an injunction, on the ground that it was not in the power of the plaintiff to obtain possession of the land under a writ of *elegit* according to the Act, the legal estate and possession being in the mortgagees.

Argument.

Mr. *Townsend*, for the defendants, submitted to such order as the Court might be pleased to make.

1864.

THORNTON
v.

FINCH.

Judgment.

The VICE-CHANCELLOR granted the injunction.

NOTE.—The Act, sec. 1, enacts that no judgment entered up thereafter shall affect any land until such land shall have been actually delivered in execution by virtue of a writ of *elegit*: A judgment creditor cannot have execution by a *fiery facias* of an equity of redemption of a leasehold estate: *Lyster v. Dolland*, 1 Ves. jun. 431, nor by an *elegit* of an equity of redemption of a freehold estate: *Plunket v. Pearson*, 2 Atk. 290. The uniform remedy in both cases for the judgment creditor has been, after suing out the writs, to file a bill to redeem: *Smith v. Hurst*, 10 Hare, 51. The Act, however,

does not deprive a judgment creditor of his charge who is unable to have the land delivered to him in execution; for it recognises (sec. 5) the charge of a judgment creditor subsequent to the charge of the judgment creditor to whom the land has been delivered in execution. If a judgment creditor could not have a charge until the land had been delivered to him in execution, a subsequent judgment creditor could have no charge, as he cannot have the land delivered to him in execution whilst possessed by the first judgment creditor: *Carter v. Hughes*, 2 Hurl. & Nor. 714.

The 1st, 2nd, & 5th sections 27 & 28 Vic. c. 112—

1. "No judgment, statute, nor recognisance to be entered up after the passing of this Act shall affect any land, of whatever tenure, until such land shall have been delivered in execution by virtue of a writ of *elegit*, or other lawful authority, in pursuance of such judgment, statute, or recognisance.

2. "In the construction of this Act the term 'judgment' shall be taken to include registered decrees, orders of courts of equity and bankruptcy, and other orders having the operation of a judgment; and the term 'land' shall be taken to include all hereditaments, corporeal or incorporeal, or any interest therein; and the term 'debtor' shall be taken to include husbands of married women, assignees of bankrupts, committees of lunatics, and heirs or devisees of deceased persons.

5. "If it shall appear on making such inquiries that any other debt due on any judgment, statute, or recognisance is a charge on such land, the creditor entitled to the benefit of such charge, whether prior or subsequent to the charge of the petitioner, shall be served with notice of the said order for sale, and shall after such service be bound thereby, and shall be at liberty to attend the proceedings under the same, and to have the benefit thereof; and the proceeds of such sale shall be distributed among those who may be found entitled thereto according to their respective priorities."

On the 5th June, 1865, on the hearing, the decree was made in the terms of the decree in *Messer v. Boyle*, 21 Beav. 559; *Leson*, vol. 1, 461.

1864.

Feb. 10, 11,
12, 13, 15,
16, 17, 22,
23, & 24.
March 2.
May 25.

THORNTON v. RAMSDEN.

THE bill in this case was filed by Joseph Thornton, of Paddock, near Huddersfield, and Lee Dyson, his equitable mortgagee, against Sir John William Ramsden, baronet, the tenant for life, and other persons having certain interests under certain indentures of lease and release dated respectively the 4th and 5th April, 1814, and under the will of Sir John Ramsden, the grandfather of Sir J. William Ramsden, the present defendant, dated the 26th January, 1838, to lands in the townships of Huddersfield, Almondbury, and Kirkheaton, all in the West Riding of the County of York, known as the Ramsden Settled Estates.

The bill prayed—

1. That it might be declared that the plaintiff was entitled to have a lease granted to him of the property (in the bill mentioned) at Paddock for sixty years, renewable every twenty years, at a ground-rent and fine to be fixed as in the bill mentioned, or at such other ground-rent and fine as the Court should think fit. Or that, if the Court should be of opinion that the plaintiff Thornton was not entitled to such lease, then that it might be declared that the plaintiffs were entitled to a lien on the property at Paddock in the possession of the plaintiff Thornton, and that they could not be turned out of or otherwise disturbed in such possession without being repaid the moneys ex-

The plaintiff took, and was let into, possession of land, for the purpose of building according to a plan agreed upon and at a rent fixed, without any agreement in writing, and without any parol agreement for a lease for a term of years; after which the plaintiff expended a considerable sum in buildings according to the plan, and continued in possession for several years, and duly paid the rent verbally fixed.

The defendant, as landowner, having brought an action of ejectment, insisting that the plaintiff was merely tenant at will—*Held*, that the plaintiff

was entitled to an injunction, and to relief in equity.

The bill prayed in the alternative for a lease, or for compensation. A private Act of Parliament having authorised leases for a certain duration, and on certain specified terms, to be granted in cases nearly similar where there was no written agreement, and it having been the usage on the estate to double the rent when a lease was executed, the Court decreed a lease to the plaintiff according to the Act of Parliament, and at the double rent.

The decision in *Pilling v. Armitage*, 12 Ves., not applicable to the case of a tenancy created for the express purpose of expenditure by the tenant in building.

1864.
 THORNTON
 v.
 RAMSDEN.
 —
Statement.

pended by the plaintiff in and about the building and laying out of such property, as a compensation to the plaintiffs for such property, or as damages in respect thereof, or such other compensation or damages as the Court might think the plaintiffs under the circumstances were entitled to. And that all necessary directions might be given for granting to the plaintiff the before-mentioned lease, or for ascertaining, raising, or paying to the plaintiffs the before-mentioned compensation or damages as the case might require.

2. That the defendant Sir J. W. Ramsden might be restrained from further proceeding on the notice to quit served by him on the plaintiff Thornton, and from commencing any action in ejectment, or other proceeding at law, to recover possession of the said premises; or from disturbing the plaintiff's possession of the property; and that the defendants might pay the costs of the suit.

3. That all necessary directions might be given, accounts taken, and inquiries made, &c. &c.

The bill set forth the title of the defendants, and alleged that during the continuance of the ownership of the late Sir John Ramsden (the settlor) the population and buildings in certain townships on the Ramsden estates had increased, and Huddersfield had become a considerable manufacturing town.

The 9th to the 23rd paragraphs, which by the evidence of several witnesses were proved to contain a correct statement of the manner in which the Ramsden estates were managed and dealt with, were as follows:—

9. The system or manner of dealing with his lands in the townships of Huddersfield, &c., for building purposes acted upon by Sir John Ramsden in and after the year 1816, up to the time of his decease, was as follows, that is to say:—No agreements in writing were entered into by him, or any agent authorised by him, with the persons desirous of taking such lease or leases for building pur-

poses, nor were any leases granted to such persons before the erection by them of houses or buildings on the said land; but upon application by persons desirous of taking such land on lease for building purposes to the steward or agent of Sir John Ramsden, such steward or agent specified or mentioned to such persons respectively the ground-rents proportioned to the superficial extent or measurement of the land so proposed to be taken; and such persons were thereupon permitted to take possession upon the understanding or agreement that after the erection by them of substantial houses or buildings thereon to the satisfaction of the steward or agent of Sir J. Ramsden, leases would be granted to them respectively in the form in which Sir J. Ramsden was accustomed to grant building leases; and after the erection of such houses or buildings, leases were granted to such persons by Sir John Ramsden in the form or to the effect of the former lease, set forth in the schedule B to the Act of Parliament, 7 & 8 Vic., c. 21. The defendants, or some of them, have possession of the court rolls or books, which would show the system of dealing with the land for building purposes.

10. By reason and on the faith and uniformity of the system or manner of dealing with his said lands and hereditaments, and the fulfilment by the said Sir John Ramsden of the expectations or promises so raised or given by the steward or agent, many persons were induced to erect houses and buildings on the said lands and hereditaments of the said Sir John Ramsden, in the townships of Huddersfield and Almondbury, and the adjoining townships, without written agreements and without specification of or reference to the terms or conditions of such leases, except as before mentioned or referred to, on the faith of leases being granted according to the system aforesaid.

11. The aforesaid custom or system of erecting buildings upon the Ramsden estates by persons without having

1864.
THORNTON
v.
RAMSDEN.
—
Statement.

1864.
THORNTON
v.
RAMSDEN.
—
Statement.

leases granted to them, but upon the understanding or agreement that leases for sixty years, renewable every twenty years, would be granted to such persons when they required such leases, is known as the tenant-right tenure, and has existed for many years. Some of the most ancient buildings in Huddersfield and the neighbourhood, which had been erected for a century at least before they were replaced by the present modern erections, had been built and were held upon the tenant-right tenure.

12. The tenant-right tenure with respect to the Ramsden estates was as follows:—A person desirous of erecting a house or other building applied to the agent of the Ramsden estates for a piece of ground such as such person required for his building; the piece of land was then staked out and allotted, and made over to such person by the agent, who fixed the annual rent to be paid for the piece of land; and such person then took possession thereof, and erected his house and other building thereon, upon the understanding and agreement between himself and such agent that he should have a lease from the ground landlord of the piece of land for sixty years, renewable every twenty years, whenever such person might think fit to require such lease; and that such person should never be disturbed in his possession. And the name of such person was then entered by the said agent in a book or roll kept for that purpose at Longley Hall, one of the seats of the Ramsden family, situate close to Huddersfield, as the tenant to the piece of land at a certain fixed annual rent. The house or buildings were erected by such person, under the superintendence and inspection of the said agent. If the person who had as aforesaid erected the said house or building sold the property, the name of the purchaser from him was, upon an application for that purpose made by such person and the purchaser to the agent of the Ramsden estate at Longley Hall, entered by such agent in the before-mentioned book

or roll in lieu of the name of such person. If the person who had as aforesaid erected the said house or building mortgaged the property, the name of the mortgagee from him was, upon an application for that purpose made by such person and the mortgagee to the said agent, entered by such agent in the before-mentioned book or roll, in addition to the name of such person. If the person who had as aforesaid erected the said house or building died, having devised the same, or intestate, the name or names of the devisee or next of kin of such person, as the case might be, was and were, upon an application for that purpose to the said agent, entered by the said agent in the said book or roll in lieu of the name of such person. In most instances leases were not required by the persons erecting houses or buildings as aforesaid, such persons being desirous of saving the expense of leases. And, as a rule both with respect to the original taking of the pieces of land by various persons for the purposes of building, and to sales and mortgages, and devises and intestacies, of and with respect to the same pieces of land, and the buildings which had been erected thereon, no deeds or writings were prepared or executed, but the names of the various persons, and of the purchasers, or mortgagees, or devisees, or next of kin under them, were, as the cases required, entered in the book or roll kept at Longley Hall for such purposes as aforesaid, and nothing more was done. There were, however, occasional exceptions to this rule, some of such persons assigning their tenant-right properties by deed, which deeds were afterwards recognised by the said Sir John Ramsden, and the names of the assignees under such deeds were entered in the said book or roll. In addition to the said book or roll, transfer books were kept and used at Longley Hall from the year 1815 to the year 1858 for the purpose of registering the said sales and mortgages, and showing the quantity and descriptions of the interest thereby assigned.

1864.

THORNTON

v.

RAMSDEN.

Statement.

1864.
THORNTON
v.
RAMSDEN.
—
Statement.

13. The persons applying for and obtaining plots or pieces of land for building as aforesaid were and have been for the most part persons in humble circumstances, and depending for their livelihood upon their daily work; and such persons could not afford the expenses of a lease. And in order to induce such persons, and the inhabitants of Huddersfield and its neighbourhood generally, to avail themselves of the opportunity of acquiring plots or pieces of ground, part of the Ramsden estates, to erect houses or other buildings thereon, the late Sir John Ramsden and his agents and the trustees of the Ramsden estates during the minority of the defendant Sir John William Ramsden, and their agents, and the last-named defendant and his agents, since he attained his majority, respectively, by their respective representations and acts, and by every means in their power respectively, encouraged persons to erect buildings on the Ramsden estates upon the tenant-right tenure, and respectively stated that there was no occasion for leases, that such persons would be quite as safe without leases as with leases, and that they would never be disturbed in their possession: and the late Sir John Ramsden and his agents, and the trustees of the Ramsden estates during the minority of the defendant Sir John William Ramsden and their agents, and the last-named defendant since he attained his majority, and his agents respectively, by their respective words, acts, and deeds, and by every means in their power, encouraged and fostered the understanding and belief that persons taking pieces of land part of the Ramsden estates for the purpose of building, could have leases of such pieces of land for sixty years, renewable every twenty years, whenever they might require such leases, and that they never should be disturbed in their possession; and the said Sir J. Ramsden, by his agents, and the trustees of the Ramsden estates since his death, in order to encourage and induce persons to erect buildings on the Ramsden

1804.

THORNTON

v.

RAMSDEN.

—
Statement. :

estates upon the tenant-right tenure, informed applicants for building plots that the rents would be less without a lease than with a lease, and that they would save the costs of a lease, and could have such lease whenever they might require it; and under the circumstances aforesaid and herein appearing, the town of Huddersfield and its neighbourhood have grown to their present proportions; and the town of Huddersfield, which was formerly a small country town, has become a considerable manufacturing town, and more than one-half of the houses and buildings in Huddersfield and its neighbourhood which have been erected upon the Ramsden estates have been erected upon and are held upon the said tenant-right tenure. And the said Sir John Ramsden and his agents, and the trustees of the Ramsden estates during the minority of the defendant Sir John William Ramsden and their agents, and the last-named defendant since he attained his majority, and his agents, respectively looked on whilst the lastly before-mentioned houses and buildings erected upon the tenant-right tenure as aforesaid were being erected, and made no objection thereto; but, on the contrary, in every manner encouraged the erection of such houses and buildings. And under the circumstances herein appearing, the plaintiff Joseph Thornton and very many other persons have erected buildings on various parts of the Ramsden estates in Huddersfield and its neighbourhood on the aforesaid tenant-right tenure, and such tenure had always been universally regarded and treated as actual estate or property, and as a tenure which could not be questioned or impeached; and for a long course of years tenant-right property in Huddersfield and the neighbourhood has been sold and dealt with as such in the open market, and both by public auction and private contract. And the said tenant-right property has been sold, mortgaged, and bequeathed. And these dealings with the tenant-right property have

1864.
THORNTON
v.
RAMSDEN.
—
Statement.

been invariably and as a matter of course recognised by the duly authorised agents of the Ramsden estates; and facilities have always been afforded by such agents for sales and transfers of the said tenant-right property. And such agents have always, without question or hesitation, upon the application of a purchaser, mortgagee, or devisee of tenant-right property, entered the name of such purchaser, mortgagee, or devisee in the before-mentioned book or roll at Longley Hall; and under the circumstances herein appearing an entire confidence was created in the said tenant-right system in Huddersfield and the neighbourhood as conferring a good title to hold land and buildings on such tenure, with a simple registration of title, without the expense of any deeds, and between the years 1845 and 1857 994 additional holdings were taken on the said estates, on the before-mentioned tenant-right system. And, as was well known in Huddersfield and the neighbourhood, Joseph Brook, deceased, who was the duly authorised agent of the Ramsden estates at Huddersfield and the neighbourhood, himself erected various houses and buildings upon divers parts of the Ramsden estates upon the aforesaid tenant-right tenure. And he also purchased various tenant-right properties from the tenant-right owners, and advanced considerable sums of money upon the security of tenant-right property. And he died possessed of considerable tenant-right property, which is still held by his descendants. The said defendant by his answer alleges that any person taking land on the tenant-right tenure became subject, as he well knew, to the risk of being disturbed in his possession if the landlord should think it expedient to disturb him. The plaintiffs charge the contrary thereof to be the truth: the plaintiffs did not nor did either of them so know or believe. The said defendant also by his answer alleges that he believes it was distinctly understood that persons holding under the said tenure were liable to be so dis-

turbed: the plaintiffs, however, insist that the said defendant could not and cannot so believe, and as evidence of this the plaintiffs rely upon the facts herein appearing, and also upon the fact that the defendant has always required such persons to build according to plans, and to enter into stipulations inconsistent with such belief; and further upon the facts that there is no instance known of disturbance of a tenant-right owner until the case of Swift, mentioned in the said answer, except for the purposes of new streets or improvements, and then only upon full compensation.

14. In the year 1837 the plaintiff Thornton was desirous of erecting a dwellinghouse for himself on the Ramsden devised estates on a high ground at a place called Paddock, situate about a mile from Huddersfield, and in the parish or township of Huddersfield. The plot or piece of land selected by the plaintiff Joseph Thornton was part of the Ramsden devised estates, and was partly an old stone quarry, with all the broken stone and rubbish scattered about, and partly heath or moor land without soil, and incapable in its then state of being cultivated. The plaintiff Thornton selected this plot or piece of land because the view was good and the air pure. If such plot or piece of land had then been brought into the market for sale the fee simple would not have realised more than 10*l*. The plaintiff Thornton informed Mr. Joseph Brook, who resided near Longley Hall, and who was one of the duly authorised agents of the late Sir John Ramsden, with respect to the Ramsden estates, and the management and letting thereof, and who transacted all the business relating to the Ramsden estates in the absence of Mr. John Bower hereafter mentioned, of his the plaintiff Thornton's desire to become the tenant of the said piece or plot of land, and to erect a dwellinghouse for himself thereon. The said Mr. Joseph Brook thereupon informed the said Mr. John Bower,

1864.
 THORNTON
v.
 RAMSDEN.
 ———
Statement,

1864.

THORNTON
v.
RAMSDEN.

Statement.

who resided at Byram, in the said county of York, and who was the principal agent of the late Sir John Ramsden, with respect to the Ramsden estates, and the management and letting thereof, of the plaintiff Joseph Thornton's aforesaid wishes; and the said Mr. John Bower, having come over to Huddersfield from Byram to attend a rent audit, did, in consequence of the information given to him by the said Mr. Joseph Brook as aforesaid, visit Paddock to inspect the said plot or piece of land. The said John Bower was accompanied by Mr. Thomas Brook, the son of the said Mr. Joseph Brook. The plaintiff Thornton, and the said Mr. John Bower, and the said Mr. Thomas Brook went together to the said plot or piece of land, and the plaintiff Joseph Thornton pointed out the same to the said Mr. John Bower, who thereupon said, "Well, this is a strange place to put a good house." The plaintiff Thornton then pointed out to the said Mr. John Bower as nearly as he the plaintiff Joseph Thornton could the intended position of the dwelling-house the plaintiff Thornton was desirous of building, and generally the extent and boundary of the circumjacent land which the plaintiff Thornton wished to lay out for gardens and pleasure ground. The said Mr. John Bower approved of the plaintiff Thornton's plan, and of such plaintiff having the land he required, and told the plaintiff Thornton that he, Mr. John Bower, should leave the staking out of the exact quantity of land to be taken by the plaintiff Thornton to the said Mr. Joseph Brook. The said Joseph Brook was the only agent of the Ramsden estates who resided near Huddersfield. He followed no other business, and he was authorised by the said Sir John Ramsden and the trustees to charge and receive, and he did charge and receive, for his own use a fee on each allotment of land made by him on the said tenant-right system, and also a fee on each transfer. The plaintiff Thornton paid the

said Joseph Brook 2*l*. for his trouble in setting out the land.

15. Some short time afterwards the said Mr. Thomas Brook, who lived with and assisted his father, the said Mr. Joseph Brook, in the management of the Ramsden estates, accompanied the plaintiff Thornton to the said plot or piece of land, and assisted the plaintiff Thornton in staking out the four corners of the dwellinghouse for the builders; and after examining the adjoining land it was agreed between the plaintiff Thornton and the said Thomas Brook, acting on behalf of his father, the said Mr. Joseph Brook, that the plaintiff Thornton should take as much of the adjoining land as he required for garden and pleasure ground, and that then the said Mr. Joseph Brook should fix the rent. Subsequently the plaintiff Thornton determined upon the quantity of land he should require for his said dwellinghouse and the garden and pleasure grounds thereto, and pointed out and explained this to the said Mr. Joseph Brook, who himself viewed the land required by the plaintiff Thornton, and agreed with the plaintiff Thornton that the said plaintiff should have such land for the purpose of building a dwellinghouse and laying out a garden and pleasure grounds.

16. The plaintiff Thornton had several interviews with the said Mr. Joseph Brook on the subject of the ground-rent to be paid by the plaintiff Thornton to the agent of the Ramsden estates for the land required by the plaintiff Thornton as aforesaid; and Mr. Joseph Brook in the same year (1837) fixed the annual rent of 4*l*. as the ground-rent to be paid by the plaintiff Thornton, and which ground-rent the plaintiff Thornton has paid ever since.

17. The plaintiff Thornton commenced building his said dwellinghouse and laying out the garden and pleasure grounds on the said land, which it had been a

1834.
THORNTON
v.
RAMSDEN.
—
Statement.

1884.
THORNTON
v.
RAMSDEN.
—
Statement.

aforesaid agreed that the plaintiff Thornton should have; and during the time the building of the said dwelling-house was going on, and when such house was almost completed, Mr. Joseph Brook came to the land for the purpose of inspecting the building and the improvements. He was accompanied by the plaintiff Thornton's father, who was then living; and the plaintiff Thornton then asked Mr. Joseph Brook his opinion as to the prudence or not of taking a lease of the said land and the buildings thereon, and Mr. Joseph Brook then assured the plaintiff Thornton, and stated to him that it would be folly to have a lease when the plaintiff Thornton was equally safe and secure without a lease as with one, and that the plaintiff Thornton would get a lease whenever he wanted one; the lease so as aforesaid referred to by Mr. Joseph Brook, and which he stated the plaintiff Thornton could get whenever he wanted, was a lease for sixty years, renewable every twenty years upon payment of two years' ground-rent as a fine. No other lease then existed or was known with reference to the Ramsden estates in Huddersfield and its neighbourhood.

18. The plaintiff Thornton completed the building of his said dwellinghouse, and laid out the gardens and pleasure grounds, under the superintendence of Mr. Joseph Brook; and such dwellinghouse and gardens were completed and laid out in or about the early part of the year 1839, at which time the plaintiff Thornton went to reside there. Such dwellinghouse is built of the most substantial and of the very best materials, and is now as sound and in as good repair as when it was completed. The plaintiff Thornton has from time to time been at considerable expense in laying out and making the garden and pleasure grounds, and they have now assumed a very ornamental character. The garden and pleasure grounds have been made and laid out principally on shelvings of broken rock and waste land, and

the plaintiff Thornton has resided in the said dwelling-house since it was completed.

19. The plaintiff Thornton did not, when he took the before-mentioned plot or piece of land, sign any paper or document.

20. The plaintiff Thornton took the said plot or piece of land, built his dwellinghouse thereon, and laid out the garden and pleasure grounds on the belief and assurance on his part, and which was universally entertained in Huddersfield and its neighbourhood, and which had been encouraged and fostered by the late Sir John Ramsden and his agents as aforesaid, that the plaintiff Thornton could have a lease of the land, and the buildings and improvements thereon, for sixty years, renewable every twenty years, whenever he the plaintiff Thornton should require such a lease; and that the plaintiff Thornton would never be disturbed in his possession; and on the knowledge that very many other persons had built houses on the Ramsden estates on the same belief and assurance, and that they had never been disturbed in their possession, and that very many other persons who had taken plots of the Ramsden estates, and had erected buildings thereon upon the before-mentioned belief and assurance, had on their application for that purpose had leases granted to them of such plots of land and buildings for sixty years, renewable every twenty years; and upon the promise and assurance made to the plaintiff Thornton by the said Mr. Joseph Brook as aforesaid that the plaintiff Thornton was equally as safe and secure without a lease as with one, and that the plaintiff Thornton could have a lease whenever he wanted one. And the plaintiff Thornton would not have taken the said plot of land had it not been for the before-mentioned belief and assurance and promise.

20a. The said Mr. John Bower died in May, 1844, and George Loch, Esquire, was appointed the principal agent

1864.
 THORNTON
 v.
 RAMSDEN.
 —
Statement.

1864.
THORNTON
v.
RAMSDEN.
—
Statement.

of the Ramsden estates in his place; and in October of that year Mr. Alexander Hathorn was appointed agent of the said estates in Huddersfield and the neighbourhood in lieu of the said Joseph Brook, who was about that time dismissed from his said agency.

21. After the plaintiff Thornton had taken the before-mentioned piece or plot of ground the plaintiff Thornton was entered in the said book or roll at Longley Hall as the tenant thereof, at the agreed yearly ground-rent of 4*l*. The bill noticed that in his answer Sir J. Ramsden averred that the plaintiff was not entered in the book till April, 1843, and proceeded to allege that the plaintiff always was led to believe that he had been entered in the year 1837, and that if he were not it was the neglect or default of Brook or Bower.

22. In the year 1845 the plaintiff Thornton found himself inconvenienced for want of out-door offices and farm buildings, and the plaintiff Thornton then applied to Mr. Alexander Hathorn, who was then the resident agent at Longley Hall, acting under and in behalf of George Loch, Esquire, the then principal agent duly authorised to manage and let the Ramsden estates, to assign to the plaintiff Thornton another plot of building ground at Paddock, also part of the Ramsden devised estates. Shortly after this application two persons who stated themselves to be, as in fact they were, in the employment of the said Mr. Thomas Brook, who had at that time become and then was one of the duly authorised surveyors and agents of the Ramsden estates, came to the plaintiff Thornton's said dwellinghouse, and measured the additional ground which the plaintiff Thornton required as aforesaid; and the plaintiff Thornton thereupon proceeded to erect, and erected on such additional ground, and which as aforesaid formed part of the Ramsden devised estates, the buildings which he required, and the same were erected under the superin-

tendence of the said Mr. Alexander Hathorn. Some time after the plaintiff Thornton had completed such buildings, the plaintiff Thornton received a written or printed letter from Longley Hall, signed by the said Alexander Hathorn, informing the plaintiff Joseph Thornton that the plan of the additional ground required by the plaintiff Joseph Thornton was approved, and that the annual rent in respect of such additional ground would be 1*l.* 7*d.*; and the plaintiff Joseph Thornton has ever since paid such last-mentioned rent.

23. The plaintiff Thornton has expended at least 1850*l.* in erecting the said dwellinghouse, offices, and buildings, and laying out the said garden and pleasure grounds; and such dwellinghouse, offices, and buildings, garden, and pleasure grounds are hereinafter referred to as the property of the plaintiff at Paddock.

The father of the present baronet died in 1836. Sir John Ramsden made his will, under which Sir John William Ramsden became tenant for life, subject to impeachment for waste, with remainders over to his first and other sons in tail male, &c. The will contained certain leasing powers, to be exercised by the tenant for life for the time being entitled in possession, if of full age; if not, then by his guardian or guardians, and also by the guardian or guardians of any tenant in tail in possession under the age of twenty-one, entitled under and by virtue of the will during the minority of such tenant in tail for the purpose of building, improving, or repairing, and to renew existing leases. The words of the power as to building leases were to grant leases for ninety-nine years, "or upon such and the same or the like terms as those upon which leases of the estate have already been granted, and to renew any existing leases upon the present system." The will contained powers of sale, enfranchise-

1864.
THORNTON
v.
RAMSDEN.
Statement.

1804.
THORNTON
v.
RAMSDEN.
—
Statement.

ment, exchange, and partition, and for the appointment of new trustees.

Sir John Ramsden died in July, 1839, without altering his will. The trustees of the will in 1844-5 applied for and obtained an Act enlarging the powers to grant leases of the hereditaments in the townships of Huddersfield, &c., contained in Sir John Ramsden's will. The Act 7 & 8 Vic. c. 21 contained the following recitals:—

“ And whereas during the continuance of the ownership of Sir John Ramsden the population and buildings on his estate in the townships of Huddersfield and Almondbury, &c. &c., greatly increased, and Huddersfield has become a considerable manufacturing town, and is for the most part built on the land of Sir John Ramsden: And whereas the system or manner of dealing with his lands and hereditaments in the townships of Huddersfield and Almondbury, and the said adjoining townships, for building purposes, acted upon by the said Sir John Ramsden in and after the year 1816, and up to the time of his decease, was as follows, that is to say, no agreements in writing were entered into by the said Sir John Ramsden, or any agent by him authorised, with the persons desirous of taking such land on lease for building purposes; nor were any leases granted to such persons before the erection by them of houses or buildings on the said land; but, upon application by persons desirous of taking such land on lease for building purposes to the steward or agent of Sir J. Ramsden, such steward or agent specified or mentioned to such person respectively the ground-rents, or rate of ground-rent, proportioned to the superficial extent or measurement of the land so proposed to be taken; and such persons were thereupon permitted to take possession, upon the understanding or agreement that, after the erection by the persons so taking possession of such lands of substantial houses or buildings thereon to the satisfaction of the steward or agent of the

said Sir John Ramsden, leases would be granted to them respectively in the form in which Sir J. Ramsden was accustomed to grant building leases; and after the erection of such houses or buildings leases were granted to such persons by the said Sir J. Ramsden in the form or to the effect of the lease in schedule B to this Act: And whereas by reason and on the faith of the uniformity of the system or manner of dealing with his said lands and hereditaments, and the fulfilment by Sir J. Ramsden of the expectations or promises so raised or given by his steward or agent, many persons were induced to erect houses and buildings on the said lands, &c., of Sir J. Ramsden in the said township of Huddersfield and Almondbury, and the adjoining townships, without written agreements, and without specification of or reference to the terms or conditions of such leases, except as before mentioned or referred to, on the faith of leases being granted according to the system aforesaid" [The Act then recited that the leases granted in pursuance of the said custom were in the form of the lease in the schedule, except as to the covenant relating to lights]: "And whereas, at the time of the death of Sir J. Ramsden many persons who had applied for and taken land as aforesaid had erected and built houses and buildings, and were in the course of erecting houses and buildings, on the said lands and hereditaments, but the leases of such lands, houses, and buildings had not been granted: And whereas in many instances leases which ought to have been granted by Sir J. Ramsden in his lifetime, pursuant to such applications and understanding, and according to such system as aforesaid, were not so granted by him by reason of the delay in preparing such leases by his steward John Bower, who was a person of advanced age and declining health, with a great arrear of business upon him: * * * And whereas since the death of Sir J. Ramsden difficulties have arisen concerning the renewal.

1864.
 THORNTON
 v.
 RAMSDEN.
 —
Statement.

1804.
THORNTON
v.
RAMSDEN.
—
Statement.

of leases in pursuance of the covenants for renewal entered into by Sir J. Ramsden: And whereas difficulties have also arisen as to the power to grant leases to the persons who applied for and took land as aforesaid in the lifetime of Sir J. Ramsden, and who have erected and built houses and buildings on such land on the faith of the system and understanding hereinbefore mentioned: * * * And whereas it would be greatly for the benefit of the persons who are and may be interested under the limitations of the said will of the said Sir J. Ramsden, if more effectual powers were given of renewing and granting leases of the said hereditaments, &c., and with authority to insert in the leases to be renewed and granted respectively explicit covenants for the renewal thereof; and if powers were also given for executing the preliminary contracts for leases, and for appropriating land for streets:" The Act then enacted that it should be lawful for the guardians of Sir J. W. Ramsden during his minority, and the survivor of them, and on his attaining twenty-one, or dying under that age, for the tenant for life for the time being in possession or remainder expectant, on the determination of certain terms, &c., by indenture, &c., to demise, lease, or grant to any person or persons who in the lifetime of Sir J. Ramsden applied for and took under the system hereinbefore described, and on the faith of a lease or leases being granted according to such system as aforesaid, any part of the said lands devised (mentioned in schedule), and who hath or have erected and built any house or houses, building or buildings thereon, for the term and with and subject to the covenants, provisoes, and agreements mentioned in the lease appended to the Act, with such variations as the parcels, number of parties, and circumstances may require, at the ground-rent or ground-rents mentioned and stated with reference to each particular case respectively, the term to

1864.
 THORNTON
 v.
 RAMSDEN.
 —
Statement.

be granted by each such lease respectively to commence and be computed from the day or time, or from some date not exceeding six months from the day or time, when the house or houses, building or buildings on the land so to be demised shall have been completed. The Act then provided for the granting future original leases and for the terms of renewal. The lease contained in the schedule was for a term of sixty years, with a covenant for renewal by Sir J. Ramsden and his heirs at the expiration of twenty years from the term or renewed term, on payment of one year's full improved value, with a stipulation that if the lessee should neglect for six months after the expiration of the said twenty years, the said J. Ramsden and his heirs should not be compellable to grant a further term until the expiration of forty years; and then the said Sir J. Ramsden or his heirs should make a new demise for sixty years, on payment of a fine of ten years' value (*a*); and if the lessee should fail to apply within twelve months after the expiration of forty years, then he shall forfeit his claim.

It appeared from the evidence that Joseph Brook was examined before the Committee of the House of Lords to prove the preamble of the bill as to the usage of the estate as to letting land for building without granting leases. In 1857, as alleged by the bill, the plaintiff having occasion to borrow a sum of money, offered his property at Paddock to the club as security for the proposed loan. The security was approved, and the money advanced. By an arrangement with the club, the plaintiff and Mr. Lee Dyson, the president of the club, went to Longley Hall, in order to have the name of the club entered jointly with the name of the plaintiff, which was done. The bill alleged that such entry was made solely for the purpose of giving security to the club, and was

(*a*) The words "full improved" in the former clause do not occur here.

1864.
THORNTON
v.
RAMSDEN.
—
Statement.

the only security except a promissory note. On the occasion when the name of the Commercial Money Club was being entered on the roll the plaintiff and Mr. Lee Dyson were not there more than five minutes; two blank forms were placed before them by the agent of the estate or the clerk; neither of the plaintiffs read them through. They signed them, without suspecting that the property at Paddock could be prejudiced. They submitted that they were not binding on the plaintiffs. No copies were given them, but on the 22nd January, 1864, they obtained copies, which were in the following terms:—

“Huddersfield.

“I, Joseph Thornton, of Paddock, near Huddersfield, in the county of York, manufacturer, do hereby give up possession of a dwellinghouse and outbuildings, situated at Paddock aforesaid, unto Sir John William Ramsden, Bart.; and I, the undersigned Lee Dyson, of New Street, for and on behalf of the Commercial Inn Money Club, do agree to become tenant at will for the said premises under the said Sir John William Ramsden, Bart., to hold from the 13th May last, at such rent as he, the said Sir John William Ramsden, Bart., shall from time to time think proper to fix.”

“Huddersfield.

“I, Joseph Thornton, of Paddock, near Huddersfield, in the county of York, manufacturer, do hereby give up possession of a barn and mistal, situated at Paddock aforesaid, unto Sir John William Ramsden, Bart.; and I, the undersigned Lee Dyson, of New Street, Huddersfield, for and on behalf of the Commercial Inn Money Club, do agree to become tenant at will for the said premises unto the said Sir John William Ramsden, Bart., to hold from the 13th May last, at such rent as he, the

said Sir John William Ramsden, Bart., shall from time to time think proper to fix."

1864.
 THORNTON
 v.
 RAMSDEN.
 —
 Statement.

It appeared from the evidence that since the present baronet had attained his majority attempts had been made to substitute for the former system leases for ninety-nine years, or for his own life, but this arrangement not being satisfactory to the tenants, in 1859 he applied for an Act (22 & 23 Vic., Cap. 4), called the Ramsden Leasing Act, 1859, which recited, *inter alia*, "that about one half of the town of Huddersfield, and parts of neighbouring villages, had been built by persons, being tenants from year to year, at their own expence, to the estimated aggregate amount of at least 750,000*l.*, without their having any lease or agreement for a lease thereof, and in the expectation only of not being disturbed in their possession; and many persons, so being tenants from year to year, had paid their ground-rents in respect of such their holdings, but, in consequence of the uncertainty of their tenure, the buildings had in many instances been suffered to fall into decay or want of repair, and it would require a considerable sum to put the whole of them into good repair; and that the number of the buildings amounted to about 2900, of a yearly rateable value exceeding 50,000*l.*"

The Act went on to recite that the ground-rents were estimated at about 4000*l.* a year, and that it was expedient and just to the persons who have so built on the holdings, or have succeeded by purchase or otherwise to the same in the expectation of not being so disturbed, and it would be for the benefit of Sir J. W. Ramsden, and the persons entitled in remainder to the estates now subject to the therein recited limitations of Sir J. Ramsden's will and the late settlement, that provision should be made for granting leases of the holdings, or some of them, or parts thereof, on long terms of

1864.
THORNTON
v.
RAMSDEN.
—
Statement.

years, on proper terms and conditions, having regard to the circumstances of the cases.

The Act then enacted that the powers given by the Act should be exerciseable by the person or persons who were by Sir J. Ramsden's will empowered to grant building, improving, or repairing leases, and that the lessor under the Act might from time to time grant leases according to this Act of any parts of the messuages, lands, &c. &c., specified in the first schedule, to any persons who before the passing of the Act had built thereon, at their own expense, without being lessee thereof, or to such other person as the lessor, in his uncontrolled judgment and entire discretion, considered justly entitled to such lease, in respect of any of the buildings specified in the first schedule, whether the buildings were made at their expense or not; or if those persons should be, by reason of any incapacity, unable to accept the lease, then to any other person on their behalf.

The Act then provided that the following terms and conditions should apply to the leases under the Act:—

First, the lease might comprise such of the hereditaments within the power of leasing as the lessor thought fit.

Secondly, the lease should be for a term to be fixed by the lessor, but not exceeding ninety-nine years, at a yearly rent, without a fine.

Thirdly, the lease to take effect immediately, or within twelve months after the granting thereof, and not otherwise, in reversion.

Fourthly, the yearly rent, where the distinct rent of the land could be ascertained, should not be less than had been hitherto paid, and might, if the lessor thought fit, be as much as the land, if it were bare of buildings, might be worth if let for building purposes.

Fifthly, the lease to contain the covenants, &c., specified in the Act.

The schedule contained the following description of the plaintiff's property:—

1864.
THORNTON
v.
RAMSDEN.
Statement.

Tenant's Name.	Joint Tenants.	No. on Plan.	Description of Property.	Situation.
Thornton Joseph	Commercial Inn Club	417 } 418 } 419 } 420 } 421 } 424 }	Dwellinghouse, Cottage, Pleasure Grounds Gardens, Wash-house, Coal Place Priory	Paddock
Joseph Thornton	Commercial Inn Club	425A	Barn, Mistal, Stables, Sheds, Piggeries, and Yard	Paddock

The bill was promoted by Sir J. W. Ramsden, and while it was pending there were public meetings held by the tenants of the estate, and a committee was appointed, who suggested several variations, all of which, but one, that all the new leases should be for a term of ninety-nine years, the defendant, as he alleged in his answer, adopted. On the 8th August, 1859, a public meeting was held which passed resolutions approving of the measure. The plaintiff Thornton was present at the meeting. One of the resolutions passed was the acceptance of the bill, and returning their thanks to Sir J. W. Ramsden, but expressing regret that the clause making all the new leases ninety-nine years was not adopted. The answer alleged that the plaintiff Thornton was a member of the committee, which, however, he denied.

Shortly after the passing of the Act Sir J. W. Ramsden caused the following advertisement to be inserted in the local papers:—

1864.
 THORNTON
 v.
 RAMSDEN.
 —
Statement.

“Ramsden Estate Leasing Act, 1859.

“Notice is hereby given that Sir J. W. Ramsden is now prepared to receive applications for leases to be granted under the provisions of this Act, and all persons who are desirous of obtaining such leases are requested to make applications forthwith at the estate office, Longley Hall.

“(Signed) ALEX. HATHORN.

“Longley Hall,

“19th Aug., 1859.”

On the 3rd October the members of the committee had an interview with Sir J. W. Ramsden, the plaintiff being present, in which he promised as a rule to grant leases at rents equal to the present value of the ground, provided the buildings were good, and an application speedily made. The plaintiff Thornton shortly afterwards went to Longley Hall, and signed an application in the following terms:—

“To Sir John W. Ramsden, Bart.

“Huddersfield, 12th Oct., 1859.

“Sir,—In compliance with the public notice issued by you on the 19th August, 1859, I beg to apply for a lease to be granted under the powers contained in the Ramsden Estate Leasing Act, 1859, of the under-mentioned premises, being part of the hereditaments described in the first schedule to the Act.

“I am, Sir,

“Your most obedient servant,

“JOSEPH THORNTON.

“no.

DESCRIPTION OF PREMISES.

417, 418. Dwellinghouse, Cottage, Pleasure Grounds.

419, 420. Gardens, Washhouse, Coal Place, and

421, 424. Priory.

425A. Barn, Mistal, Stables, Shed, Piggeries, and Yard.”

In May, 1860, Sir J. W. Ramsden caused the following advertisement to be inserted in the local papers:—

1864.
THORNTON
v.
RAMSDEN.
—
Statement.

“ Longley Hall, May, 1860.

“ Sir J. Ramsden’s Estate Leasing Act, 1859.

“ Sir J. W. Ramsden has appointed Mr. Hewitt and Mr. Hathorn to make joint valuation of the property comprised in schedule 1 to the above Act. They will begin the valuation on the 30th instant.

“ All parties desirous of obtaining a lease for the full term of ninety-nine years under the above Act must apply to Mr. Hathorn, at Longley Hall, before August 13th, 1860. The lease will date from the passing of the Act, but the revised rents will only come into operation during the current half-year, and the first payment under the new valuation will be made at the rent audit in November next.”

A copy of this notice was sent to the plaintiff, as well as the other tenants. On the 7th November the plaintiff Thornton, finding that his rent would be increased to 13*l*., withdrew his application.

Up to the filing of the first answer it appeared (par. 126) that 1460 applications had been made by tenants for leases under the Act; 230 had been granted, and about 500 withdrawn.

On the appearance of the above advertisement in May, 1860, considerable dissatisfaction was expressed by some of the tenants, public meetings held, and a memorial was presented to Sir J. W. Ramsden objecting mainly to the increase of the rents.

The bill alleged, as evidence that the tenants were not mere tenants at will, what took place in respect of the Huddersfield and Manchester and Sheffield Railways. Paragraph 50 stated that in 1845 the Huddersfield and Sheffield, and Huddersfield and Manchester Railway Companies required to take several buildings

1864.
THORNTON
v.
RAMSDEN.
—
Statement.

on part of the Ramsden estates at Huddersfield, Paddock, &c., held on the tenant-right tenure, and understanding that the owners could have leases renewable every twenty years. The companies having required such leases to be produced, the owners applied to the trustees, who granted such leases for sixty years, renewable every twenty years. The bill alleged that every one of such leases contained a recital that the lessee, being desirous of taking on lease for building purposes the piece of ground thereafter mentioned, did in the lifetime of Sir J. Ramsden apply for that purpose to the steward or agent of Sir J. Ramsden, and was thereupon permitted to take the ground and to erect buildings on the understanding and agreement that such leases should be granted to him. The bill further alleged that after the leases were granted the railway companies paid to them the compensation payable in respect of such property; that other holders of plots of land taken by the railway companies also received compensation, and expended such money in erections on other parts of the estate on the tenant-right system; and in such leases an agreement in writing was entered into between the tenants and Alexander Hathorn, representing the trustees, that such persons should pay such ground-rent as was usually charged to tenants building on the said estates without leases, and that they should be entered in the rent roll as tenants in the usual manner in respect of such other part of the said estates, and the buildings thereon; that during the lifetime of the late Sir J. Ramsden, and during the minority of Sir J. W. Ramsden, and subsequently, houses erected on the tenant-right tenure being required for the improvement of the town of Huddersfield were taken, and that the owners received from Sir John Ramsden, the trustees, and also from Sir J. W. Ramsden, through the Huddersfield Improvement Commissioners, compensation in respect of such houses, &c., the amount of which was

fixed on the basis that the owners could not be disturbed in their possession without compensation.

The following paragraphs of the bill showed the course of proceeding on the estate:—

“51a. Under the provisions of ‘The Huddersfield Improvement Act, 1848,’ and of the secondly hereinbefore-stated Act of Parliament, large sums of money have been expended by the Huddersfield Improvement Commissioners in laying out and forming new streets in Huddersfield, on parts of the Ramsden estates, and in sewerage, draining, and paving such streets, and the expenses of such works have been and are under the last-mentioned Acts charged upon the Ramsden estates, and have been and are now being recovered by the said commissioners by means of special rates laid annually for the period of thirty years upon and payable by the owner for the time being of the Ramsden estates. And since the defendant Sir John William Ramsden has attained his age of twenty-one years such defendant has demanded and received from various owners of houses and buildings erected upon the Ramsden estates adjoining such new streets, and held upon the before-mentioned tenant-right tenure, certain sums of money which the last-named defendant stated to be the respective proportions payable by such owners in respect of their various properties of the before-mentioned sums of money expended as aforesaid. And in all cases in which the defendant Sir John William Ramsden has demanded and received sums of money as last aforesaid such defendant has treated and dealt with the persons from whom he has demanded and received such sums of money as the owners of their aforesaid respective properties, and on the same footing and in the same manner as tenants of other parts of the Ramsden estates, to whom leases of such other parts of the Ramsden estates, for sixty years, renewable every twenty years as aforesaid, have been granted.

1864.
THORNTON
v.
RAMSDEN.
Statement.

1864.
THORNTON
v.
RAMSDEN.
—
Statement.

“51b. The Huddersfield Improvement Commissioners are authorised by ‘The Huddersfield Improvement Act, 1848,’ to execute sanitary works on private property as private improvements, and to recover the expenses thereof from the owners of such properties; and such commissioners, in carrying out the provisions of the said Act, invariably treat and deal with the holders of tenant-right properties at Huddersfield and its neighbourhood as the actual owners of such properties, and make and levy rates upon them as such holders, and in case of non-payment estreat the rents payable by the sub-tenants of such properties. And such commissioners have by actions at law recovered from the holders of tenant-right properties the before-mentioned expenses.

“51c. The Huddersfield Improvement Act of 1848 was obtained with the sanction of the trustees of the Ramsden estates, and the agent of such trustees in fact joined in obtaining such Act. And the defendant Sir J. W. Ramsden has under that Act the power of appointing, and has appointed, and does appoint three of the twenty-one commissioners who carry out the provisions of the said Act, and such three of the said commissioners sit permanently to protect the interests of the last-named defendant, and of the other persons interested in the Ramsden estates.

“52. The defendant Sir J. W. Ramsden during his minority, and after he came of age, and when he executed the before-stated indenture of the 19th of April, 1853, well knew of the before-mentioned tenant-right tenure, and that the various tenant-right owners holding parts of the Ramsden estates as aforesaid (and which estates as before stated comprise ‘The Ramsden Settled Estates,’ and ‘The Ramsden Devised Estates’) had taken their respective holdings, and erected buildings thereon, under the before-mentioned belief, assurance, and understanding that they could have leases for sixty

years, renewable every twenty years, of their respective holdings, whenever they might respectively think proper to apply for such leases, and that they could never be disturbed in the possession of their respective holdings without receiving compensation. The defendant Sir J. W. Ramsden during his minority, and after he came of age, and when he executed the said indenture of the 19th of April, 1853, well knew that the plaintiff Thornton had taken the before-mentioned pieces of land and erected buildings thereon as aforesaid upon the before-mentioned belief, assurance, and understanding that such plaintiff could have a lease for sixty years, renewable every twenty years, of his said property when he might think proper to require such a lease, and that the plaintiff Thornton could never be disturbed in his possession without receiving compensation. And the defendant Sir J. W. Ramsden never in any manner, until he served the notice to quit as hereinafter mentioned, questioned or disputed the before-mentioned rights of the said tenant-right owners, or the plaintiffs, or any or either of them, but, on the contrary, always acquiesced in and admitted, and by various acts, matters, and things acknowledged and confirmed such rights.

“53. In the month of November, 1861, the plaintiff Thornton, by the direction of the defendant Sir J. W. Ramsden, was served with a notice in writing signed by such defendant as follows:—

“‘I, the undersigned, Sir John William Ramsden, baronet, do hereby give you notice and require you to quit and deliver up to me quiet and peaceable possession of the dwellinghouse, cottage, pleasure grounds, gardens, barn, mistal, and stable, with the appurtenances, situate at Paddock, in the parish of Huddersfield, in the county of York, which you now hold and rent of me, on the 11th day of May now next ensuing, provided your tenancy

1864.
 THORNTON
 v.
 RAMSDEN.
 —
Statement.

1864.
THORNTON
v.
RAMSDEN.
—
Statement.

originally commenced at that time, or otherwise at or upon such other day or time, or several days or times, as the year of your tenancy therein shall end next after the expiration of half a year from the service of this notice. And I do hereby demand possession thereof accordingly.

“ ‘ Dated the second day of November, one thousand eight hundred and sixty-one.

“ ‘ JOHN WILLIAM RAMSDEN.

“ ‘ To JOSEPH THORNTON.’

“ 54. The defendant Sir J. W. Ramsden has caused similar notices to quit to be served upon various others of the said tenant-right owners.

“ 55. The defendant Sir J. W. Ramsden has caused the before-mentioned notice to quit to be served upon the plaintiff Thornton, in order that he may at the expiration of the time fixed in such order commence an action of ejectment, or some other action at law against the plaintiffs, or one of them, in one of Her Majesty's Courts of Common Law, in order to recover from the plaintiffs the property mentioned in the said notice to quit, such property being the before-mentioned property of the plaintiff Thornton at Paddock, erected and laid out by the last-named plaintiff under the circumstances aforesaid, and to turn the plaintiffs out of the possession of such property. And the defendant Sir J. W. Ramsden threatens and intends, unless prevented from so doing by the order and injunction of this honourable Court, to commence and prosecute such action of ejectment, or some other action against the plaintiffs, or one of them. And the plaintiffs are advised and submit that the plaintiffs have not, nor has either of them, any defence at law to such action, and that the last-named defendant will if he proceed with such action succeed therein, and will recover from the plaintiffs the said pro-

perty of the plaintiff Thornton at Paddock aforesaid, and will turn the plaintiffs out of the possession thereof.

“ 56. There are about 1700 persons, exclusive of money and building clubs and other mortgagees, directly interested in the holdings of parts of the Ramsden estates on the tenant-right tenure. There are many more holdings on tenant-right tenure than 1700. The schedule to the lastly before-stated Act makes the number of such holdings to be 2000 or thereabouts, but there are many instances in which many of the separate holdings are now vested in one person, or one set of persons.

“ 57. The difficulties which have now been raised with respect to the holdings of parts of the Ramsden estates on the tenant-right tenure have not arisen in any manner, neither have such difficulties been caused or created, by the plaintiffs or the other tenant-right owners themselves. The tenant-right owners have been and were (except in those cases in which, as before stated, the tenant-right owners received compensation for their respective properties), until the defendant Sir J. W. Ramsden thought proper to question their rights, enjoying their various holdings without interruption or question. They have been and were duly paying the various fixed ground-rents in respect of their several holdings, and disposing of their respective properties as they thought fit and occasion required, and taking up their leases on the old-accustomed and well-understood terms, namely for sixty years, renewable every twenty years whenever they thought fit so to do. The interruption of the old-established system has proceeded entirely and exclusively from the defendant Sir J. W. Ramsden, and such interruption has already considerably depreciated the value of the various before-mentioned holdings on the tenant-right tenure.

“ 58. The plaintiffs are advised and insist that under the circumstances herein appearing the plaintiff Thornton is entitled to have a lease granted to him of his said

1864.
THORNTON
v.
RAMSDEN.
—
Statement.

1864.
THORNTON
v.
RAMSDEN.
—
Statement.

property at Paddock aforesaid for sixty years, renewable every twenty years, at a ground-rent and fine to be fixed according to the custom which has for many years prevailed in exchanging the tenant-right tenure in diverse portions of the Ramsden estates into leasehold, or that, at all events, if the plaintiff Thornton be not entitled to such a lease, the plaintiffs cannot be turned out of or otherwise in any manner disturbed in the possession of the said property of the plaintiff Thornton without being repaid the moneys expended by such plaintiff in and about building and laying out such property, as a compensation for such property, or as damages in respect thereof; and that the defendant Sir J. W. Ramsden ought to be restrained by the order and injunction of this honourable Court from further proceeding upon the notice to quit served upon the plaintiff Thornton as aforesaid, and from commencing or prosecuting any action of ejectment, or other action or proceeding at law, to recover possession of the said property of the plaintiff Thornton at Paddock as aforesaid, or any part thereof, or which shall in any manner disturb, or tend to disturb, the plaintiffs, or either of them, in the possession of the said property, or any part thereof; and that the defendant Sir J. W. Ramsden ought to be in like manner restrained from in any manner disturbing the plaintiffs, or either of them, in the possession of the said property of the plaintiff Joseph Thornton, or any part thereof."

On behalf of the plaintiff there were upwards of eighty affidavits, containing nearly 2000 folios, filed for the purpose of showing the uniformity and universality of the custom of what was described as the tenant-right tenure, and stating numerous instances in which such tenure had been recognised. The plaintiff's first affidavit, to a great extent, was an echo of the bill. In the second batch of affidavits the plaintiff and several witnesses deposed as to the prevalence of the tenant-right tenure and the

agency of Joseph Brook. The plaintiff deposed (paragraph 1) that he had ascertained that the number of buildings under the tenant-right system subsequent to the Leasing Act of 1844 amounted to 994. In the 6th paragraph of this affidavit the plaintiff deposed "that in 1839 and 1840 Joseph Brook was the only known agent of the Ramsden estates who resided near Huddersfield; he followed no other business, and he was authorised and allowed by Sir J. Ramsden and the trustees to charge and receive for his own use a fee on each allotment of land made by him on the tenant-right system, and also a fee on each transfer thereof. The plaintiff deposed that he paid Joseph Brook for his trouble in setting out the plot of land. In 1837 Mr. John Bower was the chief agent for the Ramsden estates, residing at Byram, and who attended the rent-audit meetings, and the said Joseph Brook was the resident agent and the only known resident agent during his time at Huddersfield. Joseph Brook set out all plots to applicants for building beyond the boundaries of the town proper, and also many plots within the town, when the occupancy of such plots did not interfere with any line of streets in existence or projected. * * * In the former class of cases Joseph Brook invariably fixed the rents himself: in the latter class, as a rule, they were fixed by the said Joseph Brook and the then acting surveyor in consultation. And in every case, without an instance being known to the contrary, the rents so fixed were the rents paid; but in some few instances of the poorer class of applicants for building the rents fixed or named by Joseph Brook were afterwards lowered by himself on the parties appealing to him personally as to the amount of rent which he had named. Joseph Brook was the landlord of the Star Inn, the business of which, as an inn, was conducted by his wife and family, and which inn was known and used as the Ramsden Estate

1864.
 THORNTON
 v.
 RAMSDEN.
 —
 Statement.

1864.
THORNTON
v.
RAMSDEN.
—
Statement.

Office nearly up to the time of Mr. Hathorn's appointment, the tenants going thither for all purposes except the rent and its arrears, and new rents were generally paid at the Star Inn, except such as the said Joseph Brook collected. Joseph Brook's whole time, as a definite occupation, was engaged on the part of the owners of the estate in the management of the land, the keeping of the wood fences in repair, and the letting and setting out of plots, and receiving new rents and arrears, and other business of the said estate. Many other witnesses deposed to the same effect. Joseph Stocks, mason, and J. Sheppard, cordwainer (page 29), gave the following account of the circumstances under which they became tenants of the Ramsden estate, and which was similar to that given by several witnesses:—

“About twenty-four years ago (from October, 1862), having saved a little money and having entered into a money club, I applied to Joseph Brook, Bridgend, to set me out some land at Hebble Terrace aforesaid. Joseph Brook said, ‘Heywood,’ the tenant of the land I intended to take, ‘is a queer chap; you had better arrange with him first.’ Accordingly I paid Heywood 1*l.* 10*s.* for goodwill. Joseph Brook afterwards came and set out the ground, and I paid his fee of 10*s.* after the building was finished. Joseph Brook said that, inasmuch as I and my neighbour John Sheppard had been at a great deal of trouble with Heywood, he would let us off paying rent for two years. About three years after that I again saw Mr. Brook. He said, ‘Joseph, I want some rent of thee.’ I said, ‘Well, Mr. Brook, I am aware of that, and I will come down to the Star Inn and arrange with you.’ After that I met him at the Ramsden Arms Inn in Huddersfield, and agreed with him for 1*l.* 10*s.* a year. Mr. Brook then said, ‘Now, Joseph, you must attend the George Inn once a year, and pay Mr. Bower every April;’ and I have done so ever since.

“ I had several conversations with Mr. Brook on the subject of a lease, and Mr. Brook invariably said I was as safe as if my property was freehold. I expended 320*l.* in building.”

John Sheppard also deposed to the same effect, and that he had expended 400*l.* in building; that he had several conversations with Mr. Brook on the subject of a lease, and that Brook invariably said he was as safe as if his property was freehold. Several witnesses also deposed that in 1852 Mr. Hathorn, the then agent, made statements to the same effect. George Brook, farmer, on this point deposed as follows (page 30):—

“ In the year 1852 I and my son went to Mr. Hathorn to set me out the ground fit to build two other houses. My son said in my presence to Mr. Hathorn, ‘ Cannot you let us have a lease for all the property?’ Mr. Hathorn replied, ‘ You will be better without a lease than with one, because a lease would cost a great deal of money, and you will be as safe as if you had a lease.’ Mr. Hathorn further said, ‘ You will never be disturbed; never you bother about leases.’”

Hepworth, Williams, Moore, Spencer, J. Brook, Kaye, and others deposed to the same effect.

Aquila Gautrodger, another witness, deposed (page 34) that he married the daughter of a tenant-right owner, and in 1838 began to build; that he paid a fee; that in 1846 his father-in-law died; that, by the instructions of Mr. Hathorn, he paid his mother-in-law 40*l.* for goodwill and 10*l.* proportion of ground-rent; and that soon after, being thirteen years after he built, he was granted a sixty years’ lease, renewable every twenty years, dated May, 1853; that no fine was charged, nor back rents required.

As to the value of the property, subject to the present ground-rent, Messrs. Hall and Thornton, of Huddersfield, surveyors, deposed that the value of the house and

1864.
THORNTON
v.
RAMSDEN.
—
Statement.

1864.	buildings (on the plot taken in 1837), subject to the	
THORNTON	ground-rent of 4 <i>l.</i> , was	1075 6 6
v.	Barn and Mistal, subject to the	-
RAMSDEN.	rent of 1 <i>l.</i> 7 <i>d.</i> , was worth	116 5 0
Statement.		<hr/>
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There was also the evidence of an actuary, Jenkin Jones, that the value of a ninety-nine years' lease of premises of the annual value of 50*l.*, subject to a ground-rent of 13*l.* 13*s.* 5*d.*, was 518*l.* 7*s.*, and the value of a lease of premises of the annual value of 9*l.*, subject to a ground-rent of 1*l.* 7*d.*, was 113*l.* 14*s.*

There was also the evidence of Messrs. Thornton, Eddison, and Bradley, that up to 1858 tenant-right properties would command customers at prices commensurate with the *bonâ fide* value thereof; that since 1858, in consequence of the stoppage of the ancient and accustomed system of transfer, such property has become greatly depreciated in value.

At page 13 of this batch of affidavits (24th October, 1862) forty-five witnesses, inhabitants of Huddersfield and the neighbourhood, deposed that paragraphs 9 to 13 and paragraph 31 (inclusive) stated correctly the tenant-right tenure established in Huddersfield. In page 16 other witnesses deposed to the same effect.

From the affidavits filed on the 7th December, 1863, it appeared, though the evidence was not uniform on the question, that the rent payable on the lease being granted of land previously taken upon the tenant-right tenure was not more than double. The plaintiff Thornton, in paragraph 2, deposed that in 1853 he received intimation that he must for the future pay his rent in two half-yearly payments. J. Frost (page 14) deposed that Joseph Brook told him that if he took a lease he should have to pay more. James Brook and James Sheard (page 18)

deposed that the understanding at Huddersfield was "that tenant-right holders were entitled to sixty years, renewable if they chose to require them, but in such case the rents would in general be higher, and they would have to pay for the leases and for assignments and renewals;" that the understanding as to rent or increase of rent in the case of a lease being taken has not been uniform. In many instances the understanding has been that the parties could have a lease at the same rent, and that the costs of the lease, assignments, and renewals was the only burthen to be avoided. In another instance the increase of rent has been held out and understood to be as small as from $1\frac{1}{2}d.$, for a superficial square yard, to $2d.$ In no instance have we ever heard of the rent on lease being held out to be more than double. Michael Malinson (page 19) deposed it was not the general understanding that the tenant who held parts of the Ramsden estate upon tenant-right tenure was liable to be required to pay increased rents if the landlord for the time being should think fit to demand such increase. W. Lidster (page 32) deposed that in 1849 he obtained a sixty years' renewable lease at $3\frac{1}{2}d.$ per foot, dated 1st May, 1849, to take effect from 1st April, 1847; that the circumstance of his obtaining it originated entirely with Mr. Hathorn; that he neither expressed nor entertained the desire for a lease; that "as respects the increase of ground-rent in the lease by the trustees referred to in paragraph 3 of Hathorn's affidavit (filed the 25th July, 1862, page 52) I am unable to offer any explanation other than that I did not enter into any negotiation on the subject, nor did I ever pay any such increased rent, nor was I aware that any increase of rent had ever been charged. Such increase was entirely the act of the agent of the trustees, and the only explanation I can give is that such increase of rent must have been inserted in the lease in order to increase the compensation

1864.
 THORNTON
 v.
 RAMSDEN.
 —
Statement.

1864.
THORNTON
v.
RAMSDEN.
Statement.

money for the freehold which would have to be paid by the railway company to the trustees." Bernard Kyne (page 42) deposed that "persons about to build on the said estate on the tenant-right tenure often inquired if they would be safe without a lease, and Joseph Brook's invariable reply in my presence was 'You are as safe without a lease; you will have to pay less rent; and if at any time you think proper to apply for a lease you can have one, but you need never bother about a lease, for you never will be disturbed.'" Harry Booth, solicitor, deposed (page 49) that for a great number of years "the tenant-right tenure has been generally preferred, owing, as I believe, to the fact that the tenant-right rents were generally lower, and were not subjected to the expense of leases and of assignments, or mortgages thereof, or of fines on renewal." This witness also deposed that the taking the lease subsequently to the completion of the building was encouraged by the agents of the estate, and never objected to, and at page 50 he deposed "that the owners of leaseholds on the estates, according to my knowledge and experience of the said system, were those who had actually taken such leases as tenant-right owners, who, though they possessed no other evidence of ownership than being entered on the rent-books at Longley Hall in the usual way under the system here, nevertheless were entitled to a lease if they chose to require it, and on such terms in respect of rent as they could bargain for, in cases where no leasing rent had been agreed to, and which rent was invariably understood never to exceed double the rent as tenant-right." John Spurr deposed (page 52) "that it was part of the system that tenant-right holders, or holders at will, as they have been variously termed, might have, and I know that some of them have had, sixty years' leases, renewable every twenty years for ever, upon such terms, with regard to rent, as they could bargain for with the agents of the estate, but

it was generally understood that such rent would be double the tenant-right rent unless the agents either had agreed or would agree for a less rent." Frederick Jones, a member of a firm of solicitors formerly employed by Sir J. Ramsden, deposed (page 53) as follows:—"The system of tenant-right was shortly this—If land were offered to a man for building at 2*d.* per yard tenant-right, or 4*d.* on lease, and he took it as tenant-right, he could not afterwards be forced to take a lease, but he had a right to require one if he chose at any time afterwards. The allegation that he must elect finally when he had completed his building is a new suggestion. I never heard of it until the affidavits were filed on behalf of the defendant. After land had been so taken as tenant-right the raising of the rent to lease-rent could not be forced on the tenant. If a plot had been sold as tenant-right by one person, and another person desired to hold that plot as leasehold, the practice was for such other person, or the agents for the estate, to negotiate with the holder of the tenant-right for the purchase of his buildings, and after such holder was compensated, then the new or lease tenant was let into possession of the plot at such increased rent as he might have bargained for." The witness mentioned several instances, and (page 54) he deposed: "It was generally understood that such rent would be double the tenant-right unless the agents had agreed or would agree for a less rent." In an affidavit by sixteen solicitors of the neighbourhood of Huddersfield (page 60) there was this statement: "It was generally understood that the amount of rent at lease would not be more than double the amount of rent at will, according to the best of our remembrance, experience, and belief, acquired as afore-said." William Dransfield, solicitor, deposed (page 61) "that it was generally understood that the amount of rent at lease would not be more than double the amount of rent at will." Thirteen solicitors or solicitors' clerks (page

1864.

THORNTON
v.
RAMSDEN.
—
Statement.

1864.
 THORNTON
 v.
 RAMSDEN.
 —
 Statement.

61) deposed to the same effect. At page 64 fourteen solicitors or solicitors' clerks deposed "that it was generally understood that the amount of rent at lease would not be more than double the rent at will." William Dale (page 81) deposed that the agent told witness if he would have a lease he would have double rent to pay.

The answer of Sir John W. Ramsden to the original bill filed on the 6th June, 1862, stated, *inter alia*, in paragraph 9, that previously to the year 1816 Sir John Ramsden made 227 leases of hereditaments in the township of Huddersfield, and no more: one was a mining lease, and two leases of ground only without covenants to build, eighty-six of the leases with buildings thereon, but without covenants to build, on two of which were agreements by the lessees to build endorsed, and one of which had a provision for surrender. The remaining 138 were building leases. Of the 227 leases, the mining lease was for seven years, not renewable, at a fixed rent; of the ground leases, one was for sixty years, not renewable, at a 2*l.* rent, the other for twenty-one years, not renewable, at 60*l.* One of the building leases was for forty years, not renewable, at the rent of 1*l.* The remaining 223 leases were for sixty years at various rents. * * *

* * * In each of these 223 leases was a covenant on the part of Sir John Ramsden for renewal thereof at the end of the first twenty years on request or notice given within a stipulated time thereafter, or if not renewed at the end of the first twenty years, then at the end of the first forty years on request or notice given within a stipulated time thereafter, and in each case on the following payments:—Of these 223 leases (renewable leases) seventeen are renewable of one year's full value if renewed at the expiration of the first twenty years, and of ten years' full value if renewed at the expiration of the first forty years. The remaining 206 are renewable in 175 cases of

two years' rent if renewed at the expiration of the first twenty years, and of ten years' rent if renewed at the end of the first forty years, and in the remaining thirty-one cases on payment of certain fixed sums without reference to rent.

1864.
THORNTON
v.
RAMSDEN.
—
Statement.

In paragraph 11 the defendant alleged that after the year 1816 Sir J. Ramsden made sixty-nine leases of such hereditaments for sixty years, three of which were not renewable. In each of the sixty-six was a covenant by Sir J. Ramsden for renewal at the expiration of the first twenty years, on request or notice given within a stipulated time thereafter, or if not renewed at the end of the first twenty years, then at the end of the first forty years on request or notice within a stipulated time thereafter. Of these sixty-six leases thirty-four are renewable on payment of fines, to be ascertained or calculated with reference to the improved value of the premises. The fines payable for the renewal of twenty-three of the remaining thirty-two leases are two years' rent for renewal at the expiration of the first twenty years, and ten years' rent for renewal at the expiration of the first forty years, and in the remaining nine leases on payment of certain fixed moneys without reference to the rent. In the 14th paragraph the defendant alleged that no agreements in writing were after the year 1816 entered into by Sir John Ramsden, or his agents, but that the ground was marked out by the steward or agents, that the applicants were permitted to take possession on the understanding that after the erection of buildings to the satisfaction of the steward leases were granted in the form prescribed by the Act of the 7 & 8 Vic. The answer alleged that there must have been a distinct agreement as to the mode in which the fine should be ascertained.

The 19th and following paragraphs of the answer raised the defence mainly relied on, viz., that there were two systems of dealing, one in which the tenant built without a lease on expectation of a lease at a low rent, and the other

1864.
THORNTON
v.
RAMSDEN.
—
Statement.

in which he took a lease at a higher rent. The allegation was as follows:—

Paragraph 19. "I deny, to the best of my knowledge, information, and belief, that the so-called tenant-right tenure with respect to the Ramsden estates was such as in the bill mentioned, or otherwise than as herein appears. I believe that a person desirous of erecting a house or other building applied to Mr. Joseph Brook, but not otherwise to the agent of the Ramsden estates, for a piece of ground such as such person required for his building, and that the piece of land was then staked out, and the proposed tenant was allowed to take possession thereof, subject to the approval of the agent, but that the same was not otherwise allotted or made over to such person by the agent or any other person, and that the said Mr. Brook fixed, subject to the approval of the agent, the annual rent to be paid for the piece of land, and that such person then took possession thereof and erected his house or other building thereon; but I deny, to the best of my knowledge, information, and belief, that this took place upon the understanding or agreement between himself and such agent that he should have a lease from the ground landlord of a piece of ground for sixty years, renewable every twenty years, whenever such person might think fit to require such lease, or that such person should never be disturbed in his possession. I believe that it was distinctly understood that no lease would be granted, and in consideration of the rent being very much lower than the rent for other land to be taken on a building lease, and of saving the renewal fines, and avoiding the expenses of a lease, many persons preferred to build without having a lease or an agreement for a lease, and took the land subject to the risk of being disturbed in their possession, with the full knowledge that they were liable to be so disturbed."

In the latter part of paragraph 20 the defendant Sir J. W. Ramsden said, "I believe that persons who took land

upon the so-called tenant-right tenure, for the purpose of erecting houses or buildings thereon, were not entitled to require leases, and did not contemplate that such leases should be granted, the truth being that by the so-called tenant-right tenure, while on the one hand the tenant paid a less rent and saved the expense and obligations of a lease and the payment of a renewal fine, on the other hand he became subject, as he well knew, to the risk of being disturbed in his possession if the landlord should think it expedient to disturb him." In paragraph 26 he denied positively for himself, and to the best of his belief, as to the acts of the trustee and others, that the said Sir J. Ramsden, or his agents, induced the inhabitants of Huddersfield to acquire land, in order to encourage persons to erect buildings on the Ramsden estate on the tenant-right tenure, or that they did during his minority, or that he himself did subsequently, encourage and foster the understanding and belief that persons taking a piece of land, part of the Ramsden estate, for building purposes could have leases of such pieces of land for sixty years, renewable every twenty years, whenever they might require such leases, or that they never would be disturbed in their possession, or an understanding or belief to any such or the like effect. In paragraph 32 he denied that Joseph Brook was in any respect the duly authorised agent of the Ramsden estates, but alleged that Mr. Bower was such agent. In the 53rd paragraph the defendant mentioned several instances where tenant-right tenants had their rent raised nearly threefold. In paragraph 54(a) he alleged that he believed there was not one case in which a plot of land taken in the lifetime of Sir J. Ramsden upon the tenant-right tenure was afterwards leased with the buildings thereon for sixty years, renewable every twenty years; that in every case in which a lease was granted to any tenant who had erected buildings on the Ramsden estate, the same was granted in pursuance

1864.
 THORNTON
 v.
 RAMSDEN.
 —
Statement.

1864.
THORNTON
v.
RAMSDEN.
Statement.

of an express contract or promise to that effect, and at a higher rent, and other more onerous terms, than were required from those who took the land on what was called the tenant-right tenure; that during the defendant's minority there were comparatively few cases in which such tenures were convertible into leaseholds; and that all the leases so granted, except perhaps one or two which might have been granted inadvertently, were granted under special circumstances, or subject to special conditions. Since defendant had attained his majority there had been but three such cases.

The answer then set forth the various applications made by the plaintiff Thornton, in some of which he professed to be tenant at will in respect of the properties held by him. In the 117th paragraph the answer referred to the case of Frederick Swift, one of the tenants on the tenant-right tenure, who was ejected by means of an action in ejectment brought against him by Sir J. W. Ramsden, and tried at the Assizes, in March, 1858, at York, on which occasion the verdict passed was for the lessor.

On behalf of the defendants an immense mass of evidence was adduced for the purpose of showing that the custom on the estate was not uniform, but that for the most part special bargains were entered into in each case. Evidence also was adduced for the purpose of showing that there were two modes generally adopted in the creation of tenures on the estate—viz., one in which the tenant was allowed to erect buildings on a plot of land previously marked out, at a very low rent, without the expense or obligations of a lease, but being a mere tenant at will, and liable to be ejected at the will of the landlord; secondly, that in which the house was erected on the understanding that a lease should be granted on completion, in which case the rents were much higher, and the tenant was bound in the ordinary way.

Numerous instances, supposed to illustrate the above distinctions, were adduced.

The answer also claimed the benefit of the Statute of Fraud and the Statute of Limitations.

1864.
THORNTON
v.
RAMSDEN.

Mr. *Malins*, Mr. *Daniel*, and Mr. *F. Nalder* for the plaintiff.* *Argument.*

The evidence had clearly established that the plaintiff Thornton and the other tenant-right tenants had been induced to expend their money in building on the estate on the distinct and uniform representation that they would never be disturbed, and might, whenever they required it, have a lease for sixty years, renewable for ever, on the customary terms. If this was the result of the evidence, and it could not be disputed, the plaintiffs were entitled to the interference of this Court, either by a decree for a lease or for compensation. This was clear on all the authorities.

One of the earliest cases laying down the principle on which this Court acts was the Earl of Oxford's case^(a), which in the material facts very much resembled the present one. There the Earl of Oxford and the assignor having erected 130 houses, the college obtained judgment at law on the ground that the conveyance to the Queen by the college under the Statute 13 Eliz. was void, upon which Lord Oxford filed his bill in chancery and obtained an injunction. Lord-Chancellor Ellesmere in giving judgment said:—

"1. The law of God speaks for the plaintiff (Deut. xxviii. v. 3).

"2. And equity and good conscience speak wholly for him.

"3. Nor does the law speak against him; but that and equity ought to join hand in hand in moderating all extremities and hardships. * * * When a judgment

* The arguments in this case are unavoidably abridged.

(a) 1 Chan. Rep. 1; s.s. Leading Cases in Equity, v. 2, 504.

1864.
 THORNTON
 v.
 RAMSDEN.
 —
Argument.

is obtained by oppression, wrong, and a hard conscience the Chancellor will prostrate and set it aside, not for any error or defect in the judgment, *but for the hard conscience of the party.*"

In the *East India Company v. Vincent* (a) Lord Hardwicke says, "There are several instances where a man has suffered another to go on with building on his ground and not set up a right till afterwards, when he was all the time cognisant of his right, and the person building had no notice of the other's right, in which the Court would oblige the owner of the ground to permit the person building to enjoy it quietly and without disturbance." In that case the owner merely stood by; in this case he encouraged the tenant by a distinct representation. In *Stiles v. Cooper* (b), where the landlord, being remainder man in tail, allowed the lessee under an imperfect lease (c) to build, and received rent, but afterwards brought ejectment, the Court directed him to execute a valid lease. Lord Hardwicke in that case said, "Where the remainder man lies by and suffers the lessee or assignee to rebuild, and does not deny notice, all these circumstances together will bind him from controverting the lease afterwards." In fact, all the cases went further than the Court was asked to do here. In *Dann v. Spurrier* (d) Lord Eldon says, "I fully subscribe to the doctrine that this Court will not permit a man knowingly, though but passively, to encourage another to lay out money under an erroneous opinion of title." In *Gregory v. Mighell* (e), where there was an agreement for a lease, and the tenant entered without express permission, and expended money, the Court decreed specific performance of the agreement. In the present case both the possession and the expenditure were in the

(a) 2 Atkin, 82.

(b) 3 Atkin, 692.

(c) The lease appears not to have been pursuant to the powers contained in the private act.

(d) 7 Ves. 230,

(e) 18 Ves. 328.

contemplation of the lessor and his agents. *Shillibeer v. Jarvis* (a) was almost to the same effect. *Pain v. Coombs* (b), *Surcome v. Pinniger* (c), *Powell v. Lovegrove* (d), and *Farrall v. Davenport* (e) were also cited. *Shannon v. Bradstreet* (f), *Williams v. The Earl of Jersey* (g), and *Dann v. Spurrier* (h) were cited on this point and on the question of acquiescence. On the question of compensation the learned counsel contended that the plaintiff was clearly entitled to compensation. In *Edlin v. Battaly* (i) the Court adjudged that where a man ignorant of an old title built on the land and was ejected he should hold the land until he was repaid his charges in building.

1864.
THORNTON
v.
RAMSDEN.
—
Argument.

In the *Unity Joint-Stock Mutual Banking Association v. King* (k), where a father, intending to make over certain land at a future time to his sons, but, having never promised or bound himself to do so, allowed them to build thereon, it was held that the sons had a lien for their expenditure on the premises. See also the *Watercourse* case, *Short v. Taylor* (l); and *Peterson v. Hickman* (m) was also an authority to the same effect.

It was submitted, therefore, that, both as to the land taken in 1837 and 1845, the plaintiffs were entitled to specific performance of the agreement that they were to have a lease, or at all events to compensation.

It was suggested in the answer that the written documents described the plaintiffs as tenants at will, but it was shown by the evidence that these documents, which were

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| (a) 8 De G. M. & G. 79. | (i) 2 Lev. 152. |
| (b) 1 De G. & J. 34; s.c. 3 S. & G. 449. | (k) 25 Beav. 72. |
| (c) 3 De G. M. & G. 571. | (l) Eq. Cas. abridged, part 2, page 522, pl. 3. |
| (d) 8 De G. M. & G. 357. | (m) Cited in <i>Tudor's Leading Cases</i> , v. 2, p. 519; and in <i>Reports in Chancery</i> , part 1, p. 3, but no reference is given to the report. |
| (e) 3 Giff. 363. | |
| (f) 1 Sch. & L. 52. | |
| (g) Cr. & P. 91. | |
| (h) 7 Ves. 230. | |

1864.
THORNTON
v.
RAMSDEN.
—
Argument.

prepared by the defendants, were inconsistent with the real understanding between the parties, and had not in fact been acted on by the defendants. The plaintiffs signed them without having their attention called to the terms of the documents. They were not, therefore, binding on the plaintiffs.

The Attorney-General, Mr. Bacon, and Mr. Chapman Barber for the defendants.

The evidence showed that there were two classes of tenants on the estate—one who were mere tenants at will, who built on the land on the distinct understanding that there was to be no lease, that they were to be spared the expense and obligations of leases, and to enjoy their buildings at a very low, in some cases almost a nominal, rent, but were, on the other hand, liable to be disturbed by their landlord if he should think fit so to do, though with a belief, from the character of the Ramsden family, that they would not be treated harshly. The other class were tenants who stipulated for leases, with all their expenses and obligations, and at higher rents. The plaintiffs' case had been sought to be sustained by applying the evidence relating to one class in support of the other. The Act of 1844 was confined to cases where there had been a distinct stipulation for a lease. The Act of 1859 was designed to apply to those cases in which there had been no previous stipulation for a lease, but where persons wished to build at a specified rent. It was clear that neither Act applied to the case of tenants at will at a fixed rent.

The evidence showed that there had been no uniform system on the Ramsden estate, but that each case depended on the special agreement entered into. The plaintiff's story was, to say the least of it, improbable. He contended that the landlord, by his agents, had entered into a contract that was wholly one-sided. He was to have a lease if he

pleased, but the landlord could not compel him to take one. The plaintiff if the holding deteriorated in value might relinquish it, but the landlord could derive no benefit from any improvement in the land. Such a doctrine was quite inconsistent with the principle acted on by this Court.

1864.
THORNTON
v.
RAMSDEN.
—
Argument.

Cases had been cited where this Court relieved against bad faith where the landowner induced others to expend their money on the faith of some promise held out to them, which he afterwards violated. All the cases cited on behalf of the plaintiff were of that kind, but that was not this case. The case nearest to this in fact and principle was that of *Pilling v. Armitage* (a), where Sir William Grant distinguished between those cases where there had been an implied contract or understanding between the landlord and tenant, on the faith of which the tenant expended money, and those cases where the tenant, with full knowledge of his title, expended money on the property at his own risk. In *Dann v. Spurrier* (b) Lord Eldon laid down the same principle, and pointed out that the cases of expenditure on the faith of representations by the landlord had nothing common with those cases where a tenant at will, acquainted with his position, laid out money on the land without any contract between the landlord and tenant with reference to such expenditure.

In this case the plaintiff's own evidence showed that the only right, if any, which the so-called tenant-right holders had to a lease was a lease on terms not fixed by the original contract, but to be agreed on. It was admitted, for example, that the rent, a most material consideration in any lease, was to be increased.

The plaintiffs relied on the cases in which compensation was paid to the tenant for land required to be taken; but in all these cases it was proved that the tenant had no claim as of right to the compensation, but received it only by virtue of the landlord's permission.

(a) 12 Ves. 78; s.c. 2 Leading Cas. Eq. 520. (b) 7 Ves. 230—235.

1864.
 THORNTON
 v.
 RAMSDEN.
 —
Argument.

Then it was said that even if there were no contract by the landlord to grant leases on the terms mentioned in the will, still, the tenants having expended their money on the faith of representations made by the agents, the landlord was bound; but in *Pilling v. Armitage* there were the same kinds of representations, but it was held by Sir W. Grant in that case that they did not constitute any contract between the landowner and the tenant. But further, Brook was not the agent of the landlord, but was merely a person employed by the agent Bower, without authority to make any representation or enter into any agreement sufficient to bind the landlord, unless his acts were ratified by Bower (which they never were), to whom alone the landlord had given authority to enter into any contract on his behalf.

On the whole of the evidence the plaintiffs' case failed. It was incumbent on them to prove the alleged custom on the estate, and they had been unable to adduce a single instance in which a fine had been paid on the renewal of a single lease of the kind claimed by this bill. They had failed to show with sufficient precision what were the terms or what was the rent comprised in the lease to which they claimed to be entitled. They had failed to show any contract such as was alleged by the bill between Thornton and his landlord, and it was submitted the bill must be dismissed with costs. The following cases were also cited:—*Clayton v. Blakey* (a) was cited as to a yearly tenancy, *Blore v. Sutton* (b), *Morgan v. Milman* (c), *Allan v. Bower* (d), and *Boardman v. Mostyn* (e).

Mr. *Malins* was not called on to reply: His Honour stating that if he thought it necessary he would hereafter hear the reply.

(a) 8 T. R. 3.

(d) 3 B. C. C. 149.

(b) 3 Merivale, 237.

(e) 6 Ves. 467.

(c) 10 Hare, 279; s.c. 3 De G. M. & G. 24.

The VICE-CHANCELLOR:—

The large town of Huddersfield is for the most part built upon land of which the late Sir John Ramsden was tenant in fee simple. From the year 1816 and up to the time of his death there was an extraordinary system or manner of dealing with his land in the township of Huddersfield for the purpose of building. No agreement in writing was entered into with persons desirous of taking land for the purpose of building, nor were leases granted to such persons before the erection by them of the houses or buildings on the land. All that was done was that the person desirous of taking the land for the purpose of building made application to Sir John Ramsden's steward or agent, who fixed a ground-rent proportioned to the superficial measurement, and thereupon the person was let into possession, upon the understanding or agreement that after the erection of buildings to the satisfaction of the steward or agent a lease would be granted according to the usual form of building leases on the estate.

In the year 1837 the plaintiff Thornton applied in this manner for the first piece of land in question in this cause for the purpose of building a dwellinghouse upon it and laying out a garden and pleasure ground. His application was communicated by the agent to the steward, and the steward, upon inspection, approved of the plan, had the ground staked out and measured, and a ground-rent fixed. The plaintiff Thornton was thereupon let into possession, and proceeded to erect the proposed dwellinghouse, and has expended thereon the sum of 1850*l*. He has ever since continued in the possession and enjoyment of the land and building thus erected by him, duly paying the ground-rent.

Sir John Ramsden died in the year 1839. Under his will Sir John William Ramsden, one of the defendants in this cause, is tenant for life of the land in question. The will contains a power of granting building leases, not only

1864.
May 25.
THORNTON
v.
RAMSDEN.
Judgment.

1864.
THORNTON
v.
RAMSDEN.
—
Judgment.

for the ordinary term of ninety-nine years, but also in these words—"Or upon such and the same or the like terms as those upon which leases already granted by the testator of parts of the estate had then been granted, and to renew any existing leases upon the then present system."

This power of granting building leases was exercisable by the tenant for life, or, if not of full age, by his guardians.

In the year 1845 the plaintiff Thornton, during the minority of the present tenant for life, applied to the guardians for and obtained an additional piece of ground, adjoining that of which he was in possession, for the purpose of erecting some additional buildings. As to this, also, his plan was approved, the ground measured, a ground-rent fixed, and he was let into possession, and expended a considerable sum of money in the erection of additional buildings.

It appears that many other persons have erected buildings in the township of Huddersfield under similar circumstances. Disputes have arisen as to the right of the plaintiff Thornton and those other persons to have leases granted to them; and after much negotiation, and the rejection of the terms offered, the defendant Sir John William Ramsden, now tenant for life in possession, considering that his offers were reasonable, and that they were unjustifiably rejected, has resolved to submit the question for decision by the proper tribunal.

For this purpose he has served a notice to quit, for the avowed purpose of bringing an action of ejectment against the plaintiff Thornton. The present suit is instituted to restrain the proceedings in ejectment, and the bill prays a declaration of his right to have a lease granted to him, or, in the alternative, for repayment of the moneys expended in erecting the buildings, and a lien on the property until he is compensated.

By his answer, the defendant Sir John William Ramsden says he is advised that the plaintiff Thornton was originally,

legally, and equitably only a tenant at will, or from year to year. He denies that the plaintiff Thornton has any legal or equitable right to the property. Moreover, he states expressly that he intends, unless prevented by the Court, to commence and prosecute the action, and, if he should be so advised, to turn the plaintiff out of possession of the property.

This Court has gone very far in many cases to protect the possession of a tenant who has in good faith expended money on land in a reasonable confidence that his possession would not be disturbed.

Where land is let and taken for the sole purpose of building, the tenancy at a fixed rent being created, but the term of years not fixed, this Court never would presume that the landlord had a right to take the immediate possession and enjoyment of the building, without any compensation, as soon as the tenant had expended his money upon it. Unless on the clearest evidence of an express contract that the landlord should have that right, it probably would not be recognised.

In the present case there is sufficient evidence of an understanding or agreement that the possession of the tenant should not be disturbed. It is distinctly sworn by the plaintiff that when Joseph Brook, the agent of Sir John Ramsden, came to inspect the buildings, and when the plaintiff talked about a lease, Brook stated that it would be folly for him to have a lease when "he was equally safe and secure without a lease as with one, and that he could get a lease whenever he wanted one."

This Brook is the same person who was examined before the committee of the House of Lords to prove the preamble of the Act of 1844 as to the usage on the estate as to letting land for building without granting leases.

This Act of 1844 greatly removes the difficulties in the plaintiffs' case. It recites that by reason and on the faith of the uniformity of the system, and the fulfilment by Sir

1864.
 THORNTON
 v.
 RAMSDEN.
 Judgment.

1864.
THORNTON
v.
RAMSDEN.
—
Judgment.

John Ramsden of the expectations or promises raised or given by his steward or agent, many persons were induced to erect houses or buildings without written agreements, and without specification of, or reference to, the terms or conditions of such leases, except, as before mentioned, on the faith of leases being granted according to the system aforesaid. There is also a recital of the difficulties which had arisen as to the powers to grant leases to persons who had applied for and taken land, and erected buildings thereon, on the faith of leases being granted to them according to the system before mentioned, and that it would be greatly for the benefit of the persons interested under the limitations in Sir John Ramsden's will if power were given to grant leases to persons who had taken land and erected buildings on the faith of the system.

The Act accordingly gives power to the guardians of the present baronet during his minority, and to himself on his attaining twenty-one, to grant to such persons leases according to the form prescribed by the Act.

A great mass of evidence has been given in this cause as to the way in which various tenants on the estate were dealt with. It has been argued that the plaintiff Thornton is one of a large class of tenants who took only as tenants at will, and were entered on the book as tenants at will, and that the other class entitled to leases were so entered in the rental books. But, upon the result of the evidence it is clear that the words "tenant at will" were used merely to distinguish the more numerous class who had not actually obtained their leases. Alexander Hathorn, who acted as resident agent on the estate during the minority of the present tenant for life, states that the persons who took lands and erected buildings without any lease generally hoped and expected that they would not be disturbed.

There seems to be no doubt that the agents of Sir John Ramsden, and of the guardians during the minority of the

present tenant for life, systematically discouraged the applications for leases after buildings were erected, by representations that the rent would be doubled, and that the lease would be expensive.

The evidence affords only two instances in which, when a lease was granted to a person who had held for several years as tenant at will, the rent reserved by the lease was not increased. Whatever difficulty may be occasioned by the evidence that the rent was increased when the lease was granted, the Act of Parliament of 1844 certainly intended to obviate this difficulty, for the preamble expressly refers to the cases of no written agreement and no specification of the terms and conditions of the lease as cases to come within the benefit of the Act.

It seems clearly enough established, on the result of the evidence, that the usual course in granting leases was that the rent should be doubled. One witness (William Moore) says that Brook, the agent, used to say that the rent would be three times less if the land were taken without lease; but this is not consistent with the great body of evidence, and if the plaintiff is entitled to have a lease under the Act of 1844, the rent to be reserved upon it ought, according to the evidence, to be double the amount which he has hitherto paid.

As to the argument founded on the terms of his application in 1845 for the additional piece of ground, it seems to me to have no just foundation. The words of that application were dictated by the agents of the guardians, and were wholly unwarranted by the leasing powers of the will, or by the Act of Parliament. There seems nothing to justify them in granting a building lease, at will or from year to year, without any covenants to protect the inheritance. And upon the evidence of the transaction in 1845 it must be taken that it was on the same footing as the original tenancy created in 1837.

Whatever the rights of the plaintiff are, there seems no

1864.
THORNTON
v.
RAMSDEN.

Judgment.

1864.
 THORNTON
 v.
 RAMSDEN.
 Judgment.

ground for holding that they are affected by the evidence as to the mode of dealing with some particular tenants. His case is the same with that of the great body of tenants described in the Act of 1844, who have built without having leases, without any written agreement for a lease, without the specification of the terms or conditions of the lease according to the system recited in that Act of Parliament.

As to the Act of 1859, as its provisions are not compulsory, and as all the negotiations with the plaintiff under it entirely failed, it seems to have no material bearing on the real question in this cause, and is only part of the history of the unfortunate attempt of the present tenant for life and his agent to settle the existing disputes.

Great stress was laid by the defendants' counsel on the case of *Pilling v. Armitage* (a), which they insist is exactly applicable to the present case.

As the sole purpose and object of the creation of the plaintiff's tenancy under Sir John Ramsden was the expenditure of money on building, and it is the case of a building lease, the grounds of the decision in *Pilling v. Armitage* are entirely wide of the present question. The reasoning of Sir W. Grant is clear and convincing. He says (p. 84), "If you disconnect the improvements from any specific engagement upon the faith of which they were made, it is very difficult to give the plaintiffs the benefit of these improvements." Here there is the converse case. Here the engagement to create a tenancy was for the express purpose of the expenditure in building.

Indeed, in the last paragraph of his judgment Sir W. Grant puts the case of a landlord who enters into an agreement relative to improvements, and who advances part of the money, implying, and only implying, that the other part is to be advanced by the tenant. Even in such a case he says he doubts whether that does not fasten an equity

upon the landlord, precluding him, when these improvements are made under his authority, from saying there is an end of the lease. How much stronger is the case against a landlord who lets the land for the express purpose that the tenant may expend money in building upon it!

A great part of the argument on behalf of the defendants was applicable only to a case of specific performance. This is not a case of specific performance, and the bill does not pray relief on that footing. If it came within that doctrine there would have been force in the argument, founded on the evidence, that where leases are granted to tenants in the same situation with the plaintiff, the rent reserved by the lease was always higher than that on which the ground was originally taken, and which had been paid during the tenancy after the erection of buildings. Rent is a material part of the contract for a lease. Where the amount of rent reserved by the lease is different from that which had been reserved and paid on the original tenancy it is fair to argue that there must be a new contract.

But, inasmuch as this case stands on an equity much higher and more positive than the discretionary and ordinary equitable jurisdiction for specific performance, the argument founded on the difference of rent loses all its force. It has been shown by the evidence that the transactions with the plaintiff in 1837 and 1845 were the creation of a tenancy for the purpose of building according to the mode of dealing recited in the Act of 1844. The plaintiffs are entitled, I think, to have a lease granted according to the form prescribed by that Act, and the rent to be received in the lease must, according to what was usual on the estate, be double the amount hitherto paid. The right to the alternative relief prayed in the shape of compensation has not been discussed. Both plaintiffs and defendants seem to prefer a lease if the decree is to be in the plaintiff's favour. Therefore, there must be a decree to that effect and the plaintiff is entitled to the costs of the suit.

1864.
THORNTON
v.
RAMSDEN.
—
Judgment.

1864.
THORNTON
v.
RAMSDEN.
Judgment.

The *Attorney-General*.—It would be well to know whether the rent payable under the lease is to be a rent running back from the years 1837 and 1845 respectively, or to commence only from the present time, and what fine is to be payable at the end of forty years, for no fine has been paid at the expiration of twenty years from 1837.

The VICE-CHANCELLOR. — The double rent will only be payable from the date of the lease, up to which time the old rent only will be payable. With regard to the fine, that will be a matter for consideration in chambers when the lease comes to be settled.

1864.

Feb. 29 to
May 7,
during 33
days.—
Judgment
May 26.

YOUNG v. FERNIE.

THIS bill was filed by the plaintiffs, manufacturing chemists, for the purpose of obtaining an injunction to restrain the defendants, during the continuance of the letters patent dated the 17th October, 1850, from manufacturing, selling, or exposing for sale any paraffine oil, oil containing paraffine, or paraffine made according to the invention or specification of the plaintiff James Young, or in the manufacture or production of which any part of the said invention is used, and from in any manner infringing the rights and privileges granted by the said patent.

The bill also prayed for an account and the consequent relief.

The bill stated that by letters patent dated the 17th October, 1850, Her Majesty granted to James Young the exclusive right for England and the colonies to use his invention of "Improvements in the treatment of certain bituminous mineral substances and matters, or products therefrom," for the term of fourteen years from the date thereof, with a proviso in the ordinary form that within six months the specification should be filed.

The specification described the process as follows:—

"My said invention consists in treating bituminous coals in such manner as to obtain therefrom an oil containing paraffine (which I call paraffine oil), and from which oil I obtain paraffine. The coals which I deem to be best fitted for this purpose are such as are usually called

Inventions in mechanics are as totally different from inventions in economical chemistry as the laws and operations of mechanical powers differ from the laws of chemical affinities and the results of analysis in the comparatively infant science of chemistry, with its boundless field of undiscovered laws and substances. Where, therefore, prior to the date of an inventor's patent something necessary for the useful application of a chemical discovery for manufacturing purposes remained to be discovered, which the plaintiff's invention supplied—
Held that the manufac-

ture, with the materials and process in the specification, was a "new manufacture not in use" at the date of the patent.

The law recognises the right of an inventor who finds out and supplies for commercial purposes an article known previously only as a chemical curiosity.

This Court looks with distrust on experiments conducted with a view to litigation.

1864.
YOUNG
v.
FERNIE.
—
Statement.

parrot coal, cannel coal, and gas coal, and which are much used in the manufacture of gas for the purpose of illumination, because they yield upon distillation at a high temperature olefiant and other highly illuminating gases in considerable quantity; and although some coals last described contain a large amount of earthy matters, those matters do not interfere materially with the performance of my process. To obtain paraffine oil from coals I proceed as follows:—The coals are to be broken into small pieces of about the size of a hen's egg, or less, for the purpose of facilitating the operation. The coal is then to be put into a common gas retort, to which is attached a worm-pipe, passing through a refrigerator, and kept at a temperature of about 55° of Fahrenheit's thermometer by a stream of cold water. The temperature of the refrigerator should not be made too low, lest the product of the distillation should congeal and stop up the pipe, and I find that a temperature of about 55° Fahrenheit is sufficient. The retort, being closed in the usual manner, is then to be gradually heated up to a low red heat, at which it is to be kept until volatile products cease to come off. Care must be taken to keep the temperature of the retort from rising above that of a low red heat, so as to prevent as much as possible the desired products of the process being converted into permanent gas. The coke or residue may then be withdrawn from the retort, which, being allowed to cool down below a visible red heat (to prevent waste of the fresh material to be introduced), may be again charged with a quantity of coals, to be treated in like manner as I have described. The crude paraffine oil distilled or driven off from the coals as a vapour will be condensed into a liquid in passing through the cold worm-pipe, from which it will fall into a vessel which must be provided to receive it. Instead of obtaining the whole of the paraffine oil by distillation or driving off, as just described, a portion of it may in some cases, if thought desirable, be run from the

retort through an opening and a pipe to be provided in the anterior and lower part of the retort for that purpose after it has separated from the coal and assumed a liquid form. I prefer, however, in every case to distil or drive off the whole of the paraffine oil to be obtained from the coal. The production of the desired products from a charge of coals in a retort will be known to be finished by the liquid ceasing to run from the worm. The crude product of this process is an oil containing paraffine, which, as I have already stated, I call paraffine oil. This oil will sometimes, upon cooling to a temperature of about 40° Fahrenheit, deposit paraffine. Other arrangements of apparatus may be used for subjecting coals to the process for obtaining paraffine oil therefrom, as I have described; but I prefer to use the apparatus above mentioned, as being well-known and easily managed. But in order to obtain the largest quantity of crude paraffine oil from coals by means of this process, and produce the smallest quantity of permanent gas by the action of the heat employed, whatever may be the apparatus used, care must be taken to heat the coals gradually, and to apply the lowest temperature necessary to complete the operation. During the distillation or driving off, which I have described, a permanent gas will be produced, and this gas may either be collected or suffered to escape as may be thought expedient."

The specification then set out a process for purifying the crude oil, and to extract paraffine from the purified paraffine oil, and concluded with the following statement:—

"Having thus described the nature of my own invention, and the best means with which I am acquainted for performing the same, I hereby declare that I claim as my invention the obtaining paraffine oil, or an oil containing paraffine, from bituminous coals by heating them in the manner hereinbefore described."

On the 7th October, 1850, and the 1st February, 1851,

1864.
YOUNG
v.
FERNIE.
—
Statement.

1864.
YOUNG
v.
FERNIE.
—
Statement.

patents were obtained for the same discovery for Ireland and Scotland.

The bill stated briefly that the paraffine oil was exhibited among the chemical contributions at the Exhibition of 1851, that certain proceedings were taken by the plaintiff to restrain the infringement of his patent, and in particular an action in the Court of Session against the Clydesdale Company, which was ultimately settled by a payment to the plaintiff by the Clydesdale Company. The bill then stated the circumstances under which the plaintiff had ascertained that the defendants, at their works at Leeswood and Saltney, were infringing the plaintiff's patent by manufacturing paraffine and paraffine oil according to the plaintiff's process out of cannel coal. This bill was subsequently filed.

The defence to the bill set up by the defendant Fernie and the others in their several answers was as follows:—

First. I have not infringed the said patent of the plaintiff Young, the process of manufacture adopted and used by me being substantially and essentially different from that described in the specification of the said plaintiff.

Secondly. The said letters patent are invalid for want of novelty.

Thirdly. The said letters patent are invalid because the specification filed by the plaintiff Young is untrue, uncertain, insufficient, and framed so as to mislead.

It appeared from the evidence that the plaintiff, having, on the suggestion of Dr. L. Playfair, taken a lease of a petroleum spring in Derbyshire, came to the conclusion that the petroleum was the result of a natural distillation of bituminous substances by the heat of the earth, condensed through the sandstone formation. He immediately commenced a series of experiments during two years upon bituminous coal, and on the 17th December, 1850, applied for his patent for obtaining paraffine and paraffine oil from parrot coal, cannel coal, and gas coal, and shortly after-

wards established his manufactory, which became subsequently very extensive. The fair result of the evidence seemed to be that the plaintiff by his process was the first who produced paraffine in such quantities as made it commercially a profitable manufacture. Paraffine was first discovered by Dr. Reichenbach in 1830, and was first obtained from beechwood tar. What first attracted the special attention of chemists was, that paraffine, though a white solid substance, was composed of exactly the same elements, in exactly the same proportion, as olefiant gas. It was in fact solidified gas, and is formed by one equivalent or combination of hydrogen to six of carbon. It had been supposed by some persons that paraffine might be obtained from certain schists, but the plaintiff's experiments led him to conclude that the proper materials for the product were the cannel and highly bituminous coals. The process of dry distillation of coal had been carried on previously to Mr. Young's discoveries (mainly for the manufacture of gas), but it had been carried on at a high degree of white or red heat, by means of which gas and tar were produced. Coal tar contains four different elements—crisine, which has one part hydrogen to eighteen carbon; naphthaline, which contains one part hydrogen to sixteen parts carbon; benzole, one part hydrogen to twelve carbon; and cymole, one part hydrogen to nine carbon. All these substances contain such a proportion of carbon over paraffine that they are unfit for illuminating purposes. The principle of the plaintiff's discovery was the degree of heat at which his distillation was carried on. The heat which by his experiments he ascertained to be proper for producing paraffine was a low red heat which was visible in the dark. If the heat be increased, the quantity of paraffine is diminished, while the quantities of gas and tar become increased. This was substantially the process patented, and the plaintiff described it as improvements in the treatment of certain bituminous mineral substances and in obtaining products

1864.
YOUNG
v.
FERNIE.
—
Statement.

1864.
 YOUNG
 v.
 FERNIE.

Argument.

therefrom. What he claimed as new was the mode of obtaining the crude oil by heating bituminous coal according to the process described.

Mr. Grove, Mr. Bovill, Sir H. Cairns, Mr. Hindmarch, Mr. Webster, Mr. Karlake, and Mr. Lawson appeared for the plaintiff.

Mr. Grove opened the case, and stated that Mr. Young's specification described the very best mode of obtaining the products desired. On the question of construction the rule was that a specification was not to be read as a deed or a plea, because those instruments had acquired by usage a fixed definite meaning, and if there were an error, the party relying on such instrument must suffer, rather than that the rules of construction should be violated. But a specification was the instruction to the present manufacturing world, and must be construed according to the canon laid down in the decided cases, that it must be read by a party willing to make himself master of the invention and what it disclosed: *Beard v. Egerton (a)*, *Russell v. Cowley (b)*. In this case it was not denied that the specification disclosed sufficiently, to a man willing to understand, a mode by which he could with certainty obtain the product desired.

The conduct of the defendants in seeking surreptitiously, under the form of a licence to Mr. Jones, and by an application for a licence by Mr. Fernie, to get at Mr. Young's process was strong *prima facie* evidence of infringement. The second and principal ground of defence in this case was want of novelty. Now it was not pretended that so far as his own mind was concerned the plaintiff was not the inventor of his process. It was not pretended that Mr. Young took the invention from any book or person, or that the substance before the date of his patent was known as an article of commerce.]

(a) 8 C.B. 165.

(b) 1 Cr. M. & K. 864.

The case made by the defendants was that the discovery was in fact an old one, and they relied on twenty-two specifications, and on extracts from books going back 200 years.

There were one or two modern cases to which he, Mr. Grove, desired to call attention. There used to be a notion, which in some of the older cases had been used disadvantageously to patentees, that if terms could be found in a publication prior to a patent within the four corners of which the plaintiff's alleged discovery might be found, that that would be an anticipation and would render the patent invalid. That was a fallacious mode of reasoning, and fortunately was not the law. The mere fact of there being a previous publication in which the patentee's invention is jumbled up among other things does not invalidate the patent. In order to amount to an anticipation the discovery must have been previously disclosed, so as to do away with the necessity of an experiment, or, in other words, it must be shown that the information contained in the specification must have been previously given to the public. This was clearly laid down in *Hills v. The London Gaslight Company* (a), in which the question was between two patentees. In *Hill v. Evans* (b) Lord Chancellor Westbury on this subject expressed himself thus:—"Now the question is, What must be the nature of the antecedent statement? I apprehend the principle is correctly thus expressed:—'The antecedent statement must be such that a person of ordinary knowledge of the subject would at once perceive, understand, and be able practically to apply the discovery without the necessity of making further experiments and gaining further information before the invention can be made useful.' If something remains to be ascertained which is necessary for the useful application of the discovery, that affords sufficient room for another valid patent."

1864.
YOUNG
v.
FERNIE.
Argument.

(a) 5 H. & Nor. Ex. 312.

(b) 31 Law Journal, 457.

1864.
 YOUNG
 v.
 FERNIE.
 Argument.

The world, as it were, works up to a discovery, and between the successful discovery and the unsuccessful efforts there is frequently but a very small step. But, as a general rule, that portion of the public who are concerned in a particular branch of manufacture, be it chemical or be it mechanical, are the best judges of who has really hit the nail on the head, if it were permitted to use the expression. Therefore, when they recognise it the public gets possession of it, and their judgment is not commonly erroneous. But always when a discovery has been made, when the public has reaped the fruits of it, there is no case, and never was a case, either in the history of pure science or in the history of practical discovery, where it is not alleged, "If you look at such a book, and such another book, you will find that so and so has been done, and you will find that it has been anticipated." That is partly true and partly false. There are in all such cases approximate anticipations. The difference is that one man gets at the points, hits upon the real thing which will do it, and the reason why it will, whereas other people, although they may have got the thing, have not acquired an accurate knowledge which will enable them with certainty to produce it. There cannot be a more striking illustration of that than the history of gunpowder. The common clap-trap notion of the invention of gunpowder is this: that a monk of Cologne named Schwartz put sulphur, charcoal, and saltpetre into a pot, and then when he melted them altogether it exploded and blew off the top of the pot. Such was the received notion in ordinary books of what led to the discovery of gunpowder, whereas it was well known that gunpowder was originally a Chinese invention, and that it got from China to Arabia, Arabia to Greece, and from Greece to England.

The Eastern term for saltpetre would be written "berod." That term was applied to any sort of salt except sea salt. But when other saline experiments were made

there were all sorts of salts used, including sea salt and this "berod," and they were thought to be all one and the same thing. Then one person tried to make gunpowder, and if he had happened to have got saltpetre, he would have made gunpowder from it. But if another person took a different sort of salt, he would never make gunpowder. The same term was applied to all salts, minus sea salt, and that prevented the discovery of gunpowder being made many centuries earlier than it was.

The discovery of gunpowder came first into practical use at the Battle of Cressy, under the term of "Greek fire." Of course that did not give the public precise knowledge, but that is no reason why gunpowder was not known or partly known under the name of Greek fire, which was nothing but another pyrotechnic term. It was practically hidden from the public because chemistry had not arrived at the point of distinguishing one from the other.

The above is one illustration, and that might be applied to a vast number of other discoveries. They are frequently produced before in experiment. They are produced by other things, but the great discoverer is the man who gives to the world a clear power of repetition—a clear mode of reproducing the result which he says he has arrived at. That man is the discoverer. But when you read anterior publications by the light of that discovery they acquire a very different sense from what they would have if read at the date they were written. That is another important fallacy which pervades these cases. It is very easy to say such a thing existed in A's patent or B's patent, because now we know the conditions, and know the temperature of heat necessary to produce this and that effect, and we can apply the value of the new chemical discovery of paraffine to commercial uses, as applied by Mr. Young. But at these antecedent periods they did not know this and the proof that they did not know it was that in the

1864.
YOUNG
v.
FERNIE.
—
Argument.

1864.
 YOUNG
 v.
 FERNIE.
 ———
Argument.

year 1850 paraffineoil was an unknown and an undiscovered substance. Now there was one other important matter in this case as to the effect produced by the heat on what are called products, not educts. Suppose one took the oil of bricks, which the defendants put forward as an anticipation of this patent. If one were to soak bricks with oil, and also soak a piece of freestone with oil, and heat it to a red heat, and obtain an oil drop from it, that would simply be an educt. But if one takes a chemical substance like coal, and if in proceeding by heat one changes the component parts and re-arranges them to produce a substance which does not exist as that substance in coal, the result is what is called a product, and not an educt. That is the case with paraffine. If you powder coal and soak it in ether you either get no paraffine or such a quantity as to be infinitesimally minute, and the coal so treated remains just as capable of producing paraffine as it did before, showing that paraffine and paraffine oil (and the same may be said of other bituminous matters) is not a substance existing in specie in the coal, but is a substance produced by the action of heat on the coal.

Therefore, the definite amount of heat and the other circumstances attending the manufacture become very important, for by comparatively slight changes you may change the product, it not being an educt, but a thing produced by the action of the heat upon the coal. By varying that action you get varying products, as has been said, increasing in carbon as you go on, and the gaseous products decreasing in carbon.

The defendants themselves make this a not unimportant point, for they seek to rely upon their performing the process at a slightly lower temperature, but there is no doubt that when they come to the books they will take the converse argument and say temperature is not a very important matter. These different books give you this temperature *inter alia*, and therefore it is not an im-

portant matter. Mr. Young has given what is undoubtedly a practical process. If persons can do it so as to get fairly out of his patent, either by not acting upon the materials which he directs them to use or not acting fairly and substantially in the way he directs them to act, they are at liberty to do so. But of course no infringement is an absolute imitation. Every infringer tries to make his infringement appear different from the patent. The question is one of degree, and one that the Court will look at as a judge of facts as well as of law, and will see whether it comes within the line, and whether or not these persons have appropriated substantially Mr. Young's discovery.

1864.
YOUNG
v.
FENNIE.
—
Argument.

In *Steiner v. Heald* (a) a patent had been obtained for producing a dye called guarancine from refuse madder, by reheating it in the way madder was heated. It was contended in that case, as here, that any one who obtained guarancine from fresh madder must know that it could be obtained from spent madder, but the Court of Error held that it did not follow, because sulphuric acid would extract guarancine from fresh madder, that it would extract it also from spent madder. To ascertain this an experiment was necessary, and therefore the direction of the Court below, which declared the process could not be a new invention, was reversed.

Again, in *Muntz v. Foster* (b), the yellow metal patent, the same thing had been done previously with the same two metals, but Mr. Muntz ascertained that the only thing which invariably succeeded was the best selected copper with foreign zinc. The novelty was the quality of the metal. That was a far stronger case than this.

On the whole case, therefore, it was submitted that the plaintiff had made an important practical discovery, embodied within the terms "new manner of manufacture"

(a) 6 Ex. 607.

(b) 2 Webster, 92, 93.

1864.
 YOUNG
 v.
 FERNIE.
 —
Argument.

used in the statute of James under which at the present day letters patent are granted. It was equally clear the defendants had infringed that patent and the plaintiff was entitled to the relief he asked by his bill.

The *Attorney-General* (with whom were Sir *F. Kelly*, Mr. *Wyllys Mackeson*, Mr. *Chance*, Mr. *Downing Bruce*, and Mr. *Aston*).—Before the evidence is brought to the attention of the Court perhaps it would be as well to consider the construction of the specification before going into the general evidence in the whole of the case. This was the course adopted by the Lord Chancellor in the late case of *Foxwell v. Bostock*, on the ground that the direction of the evidence and its weight might materially be affected by the construction the Court put on the specification. In this case two important questions depend on the construction of the specification. In *Foxwell v. Bostock* the question raised was on a patent for machinery.

[The Vice-Chancellor.—I shall better understand the arguments on the construction of the specification after I have heard the whole of the evidence in the case.]

The evidence was then adduced. Dr. A. W. Hoffman was the first witness examined. He was one of the jurors of the Exhibition of 1851, not sworn, and jointly with Mr. W. De La Rue prepared the report for class 29.

A discussion arose whether such report could be put in, and *Young v. White* (a) was cited against the admission of such report. Ultimately the report was admitted, to prove the notoriety of the discovery. Dr. Hoffman was cross-examined by the Attorney-General mainly to show, first, that paraffine might be produced from schale or schist; secondly, that the discovery of Mr. Young had been anticipated. The cases of *Young v. Clydesdale Company* and *Gillespie v. Russell*, *Du Buisson's specification*, *Count*

(a) 17 Beav. 536—7.

de Hompsch's patent, Reichenbach's works, Kiddo, Dumas, Poggenдорff, Morand, Encyclopédie Méthodique, M. de Gensanne, M. Sage, M. Sellique, Lord Dundonald's process, Dr. Ure's Dictionary, Sir Robert Kane's treatise of 1841, and Annals of Philosophy, by Dr. Henry, were referred to.

1864.
YOUNG
v.
FERRIE.
—
Argument.

The case of *Davenport v. Jepson (a)*, before Vice-Chancellor Wood, was referred to as to the mode of proceeding. His Honour stated his intention to decide the cause without the assistance of a jury.

Dr. Lyon Playfair, Sir R. Kane, Dr. Odling, the plaintiff, and a great number of scientific witnesses were examined and cross-examined on the question of the novelty of the discovery. There were also a great number of witnesses examined and cross-examined on the question of infringement. On the eighth day of the proceedings the defendants' case was opened.

The *Attorney-General*, on behalf of the defendants.—Before calling the attention of the Court to the examination of the precise thing claimed in the specification it ought to be premised that there has been no previous decision on this question, the materials now before the Court being presented for the first time for consideration, the alleged infringement differing from that alleged in former cases.

The duty of a patentee is to distinguish on the face of the specification what he claims and what he does not claim as covered by the specification, because if the specification in its general terms includes something not new or not available for the purposes mentioned, and which is not distinguished from what is specifically claimed, the specification fails altogether. This is the well-established canon of construction.

In *Holmes v. The London and North-Western Railway Company (b)*, decided in 1852, the specification claimed an

(a) On appeal before the Lords Justices, Dec. 16, 1862, not reported.

(b) 12 C. B. 831; s.c. *Macrory, Patent Cases*, 4.

1864.
YOUNG
v.
FERNIE.
—
Argument.

improved turning-table consisting of several parts, and it was held that the patent must be treated as claiming a right to each of the parts, and not merely the whole in combination; and it appearing that some of the parts had been used before, the defendants were held entitled to a verdict on the issue of the sufficiency of the specification. The earlier cases were discussed in that case, and Sir J. Jervis, who delivered the judgment of the Court, made the following observations:—"It is admitted, as a general proposition, that every patentee must in his specification describe the nature of his invention either directly or in such a way as that those who read the specification with common ordinary understanding, and fairly read it, may see and understand what is new and what is old. And it is likewise, on the other hand, as equally free from every doubt that a patentee may take a number of old and well-known instruments or parts of instruments and may have a good patent for a combination of the known instruments or parts, if he so describes it in his specification." The learned judge then considered the various cases, and continued thus:—"Nobody can read this specification without seeing that at the time the specification was made, as the counsel for the plaintiff admits, Harrison did not know that Hancock's patent (that was an earlier patent for a certain portion of the thing which he applied to a different whole) was in existence." Then how was it possible, if he did not know of it, to point out what was old and what was new? The Lord Chief Justice enlarged further upon that and held it bad.

Mr. Justice Maule held the same thing, saying, "But in fact, without looking at anything external to the specification, which is the true way of construing it, it is most manifest that he claimed every one part as much as he claimed every other. There is no distinction, and you must treat it as a claim to the whole. Now it was evident upon the evidence in this case, and the finding of the jury,

that the whole was not his invention." The learned judge then added, "You are not to look for this purpose at anything external to the specification. You must confine yourself to what appears in the four corners of the document itself; and if you do not find there the distinction drawn, the patentee must stand or fall by the test, whether every part of that which is comprehended in it is new."

In *Telley v. Easton* (a) it was held that a specification describing a patent invention must, unless a contrary intention appears, be deemed to claim all that it describes not only as a whole taken in combination, but also all the essential component parts. There the specification described a centrifugal pump consisting of a hollow wheel revolving within a case furnished with proper pipes for carrying the water, and the wheel was not disclaimed nor stated to be old. Various modes of constructing the pumps were described. The specification contained a claim in general terms to "the machinery for raising and impelling water," and another to the application of the before-mentioned inventions both when used in combination or severally. It was held that the specification claimed the wheel. Lord Campbell, approving of the doctrine laid down in *Holmes v. The London and North-Western Railway Company*, said, "According to the law laid down in *Holmes v. The London and North-Western Railway Company*, there must be a verdict for the defendant."

In *Carpenter v. Smith* (b) there was a patent for improvement in locks and other securities applicable to doors and other purposes, and a subsequent partial disclaimer. Lord Abinger said, "The objection to this specification originally is plain on the face of it, and it is this, it is required as a condition of every patent that the patentee shall set forth in his specification a true account and description of his patent or invention, and it is necessary in that specifi-

1864.
YOUNG
v.
FERNIE.
Argument.

(a) 2 Ellis & B. 956; Macrory, 82. (b) 9 M. & W. 300; 1 Webster, 532.

1864.
 YOUNG
 v.
 FERNIE.
 Argument.

cation that he should state what his invention is, what he claims to be new, and what he admits to be old; for if the specification states simply the whole machinery which he uses and which he wishes to introduce into use, and claims the whole of that as new, and does not state that he claims either any particular part or the combination of the whole as new, why then his patent must be taken to be a patent for the whole and for each particular part, and his patent would be void if any particular part turns out to be old or the combination itself not new."

Now in connection with that case, and more particularly with that aspect of it which is noticed by Lord Campbell—namely, the necessity that the specification must be clear, unambiguous, and not uncertain—he, the Attorney-General, would refer to one or two earlier cases in which that had been held, coupled with this result, that wherever the patent is not so expressed as sufficiently to guide and in no respect to mislead the public or those who follow and work upon it that patent is bad. Now one of the earliest and most frequently referred to cases on that subject was *Turner v. Winter (a)*, afterwards referred to with approbation in a later case. The point which was determined as stated in the note was this. A patent is void if the specification is ambiguous or gives directions which tend to mislead the public. Mr. Justice Buller said, "Many cases upon patents have arisen within our memory, most of which have been decided against the patentees upon the ground of their not having made a full and fair discovery of their inventions. Whenever it appears that the patentee has made a fair disclosure I have always had a strong bias in his favour, because in that case he is entitled to the protection which the law gives him." Then he says, "But where the discovery is not fully made the Court ought to look with a very watchful eye, to prevent any imposition on the public."

(a) 1 Term Rep. 602; s.c. 1 Webster, 81.

At page 606 he says, "The question then was whether the plaintiff in this case had made a fair discovery. I do not agree with the counsel who have argued against the rule in saying that it was not necessary for the plaintiff to give any evidence to show what the invention was, and that the proof that the specification was improper lay on the defendant, for I hold that a plaintiff must give some evidence to show what his invention was, unless the other side admits that it has been tried and succeeds. But whenever the patentee brings an action on his patent, if the novelty or effect of the invention be disputed, he must show in what his invention consists and that he produced the effect proposed by the patent in the manner specified. Slight evidence of this on his part is sufficient, and it is then incumbent on the defendant to falsify the specification. Now in this case no evidence was offered by the plaintiff to show that he had ever made use of the several different ingredients mentioned in the specification, as, for instance, mimum, which he had nevertheless inserted in the patent. Nor did he give any evidence to show how the yellow colour was produced, if he could only make it with two or three of the ingredients specified, and he has inserted others which will not answer the purpose that will avoid the patent. So if he makes the article for which the patent is granted with cheaper materials than those which he has enumerated, although the latter will answer the purpose equally well, the patent is void, because he does not put the public in possession of his invention or enable them to derive the same benefit which he himself does."

There was another proposition connected with those which had been before referred to: that is, if the patentee in fact has covered by his patent more things than those which will really answer the purpose, not only if some of them are old, then he fails; and not only if it is ambiguous whether they are old or new upon the face of the patent, then he fails, but also if some are not useful for the purpose he fails.

1864.
YOUNG
v.
FERNIE.
—
Argument.

1864.
 YOUNG
 v.
 FERNIE.
 —
Argument.

Turner v. Winter was referred to afterwards in the case of *Derosne v. Fairie* (a). We have got there something about bituminous schistus for a very different purpose—namely, the purification of sugar. The passage referred to occurs in the judgment of Mr. Baron Bolland. There are several passages in all the judgments which are to the purpose. And perhaps Mr. Baron Parke's observations may be taken as expressing the case. He says, "The specification does on the whole truly describe the nature of the invention as declared in the patent, nor does there appear to be sufficient obscurity in the clause with reference to the baking to avoid the patent on that ground. But it seems to me to have been clearly the duty of the plaintiff to have done one of two things—viz., either to have shown that bituminous schistus, with the admixture of sulphurate of iron, as it is known to exist in England, would answer the purpose beneficially, or that the sulphuret could be removed by any practical man so as to give no colour to the syrup." He doubted whether there was not some evidence, but the Court in general thought there was none.

Mr. Baron Bolland said he did not agree to the objection which was taken to the title, and then he said, "Very early in the argument it appeared to me that justice could not be done in this case unless we granted a new trial, because on the judge's notes it appeared that no evidence had been given by the plaintiff that bituminous schistus, procured from whatever place in which that substance could be found, would answer the purpose intended—that is, he had specified for bituminous schistus generally, but he had not shown by the evidence at all that schistus, wherever found, would answer the purpose intended. The only evidence which the plaintiff gave that bituminous schistus when used in the process described produced the desired effect applied to a pulverised substance which the witness had purchased from the plaintiff at Paris. Now if the plaintiff

(a) 2 Crompton, M. & R. 476; s.c. 1 Webster, 152-4.

had gone on to show that that substance was bituminous schistus as to which nothing had been done, but that it produced the effect in its natural state, a great part of the difficulty would have been removed; but that not being proved, it was left in doubt whether all bituminous schistus would produce the effect attributed to it in the patent. Without doubt the onus of that proof lay on the plaintiff. An authority, if wanting, might be found in the judgment of Mr. Justice Buller in the very early case of *Turner v. Winter*; and that very learned judge added a most extensive acquaintance with the subject of patent right to that knowledge of law in which he was at least equal to any person who before or since his time has occupied a seat on the bench. He would therefore advert more particularly to his judgment in that case in order to adopt its terms in application to the present." Then he cited a passage which had been already read to the Court.

Morgan v. Seaward (a), which is on the same principle, illustrates it in another point of view. That case determines that exceedingly well known rule which prevails in patents—and which ought to warn patentees not to make an *omnibus* jumble in their patents for a great variety of things hardly, if at all, connected together—that if any one of several inventions recited in a patent for improvements be not an improvement, the patent is wholly void.

The *Attorney-General* then called attention to the claim made by the specification, submitting that, as to the material, the plaintiff claimed the exclusive right to extract paraffine and paraffine oil from bituminous coal. Secondly, as to the process, he claimed the plan of breaking up the coal into small pieces, and by a well-known and easily arranged apparatus, which he did not claim, defined his process thus:—"The retort, being closed in the usual manner, is then to be gradually heated up to a low red heat, at which it is to be kept until volatile products cease

1864.
 YOUNG
 v.
 FERNIE.
 Argument.

(a) 1 Webster, 187.

1864.
 YOUNG
 v.
 FERNIE.
 Argument.

to come off. Care must be taken to keep the temperature of the retort from rising above that of a low red heat, so as to prevent as much as possible the desired products of the process being converted into permanent gas." This was what was relied on as constituting the alleged novelty. The low red heat was described as being at 977 to 980 degrees of Fahrenheit.

The *Attorney-General* then called attention to the cases of *Kay v. Marshall* (a), *Young v. White*, and the *Clydesdale case* (b), and called attention to several treatises in which coal was defined, contending that there was no novelty in the material or the process.

The *Attorney-General* then called attention to Reichenbach's mode of distillation, observing that Dr. Hoffman admitted that if Reichenbach had been operating on boghead coal, the product would have been the crude oil of the plaintiff, and that the paraffine of Reichenbach was a large constituent of the plaintiff's crude oil. It was clear, therefore, that the production of the crude oil by distillation at a low temperature was known; but if so, the merely determining the precise degree of temperature is not the subject of a patent: *Kay v. Marshall* (c).

Again, if the extraction of the crude oil from bituminous shale by the same process was a known thing, no patent could be legally taken out for the application of it to a different but analogous substance in order to obtain the same product. In *The Queen v. Cutler* (d) the marginal note was as follows:—"The mere application of a known article to a new use, the mode of application not being new, but before the date of the patent having been used in applying an analogous article to the same purpose, is not a manufacture within the meaning of the statute, and cannot be made the subject of a patent." The same principle was laid down in a case as to a patent for wheels

(a) 2 Webster, 34, 36.

(c) 8 Clk. & Fin. 245; 2 Webster, 39.

(b) Not reported.

(d) *Macrory*, 124, 135-139.

in *Losh v. Hague* (a), and in a case as to a patent for improving the texture of threads of cotton and linen yarns, *Brook v. Aston* (b).

1864.
YOUNG
v.
FERNIE.

Argument.

[The VICE-CHANCELLOR.—There seems to be no analogy between those cases and the present, because if the doctrine laid down there were to be adopted implicitly as to chemical subjects it would be impossible to foretell results.]

The *Attorney-General*.—In *Calvert v. Ashburn* (c), in which the judgment of the Court of Queen's Bench was affirmed by the Exchequer Chamber, the same principle was applied to a patent for making starch.

On the distinction between chemical discoveries and others, his Honour mentioned the case of *Stevens v. Keating* (d).

Jones v. Berger (e), a nisi prius decision, was mentioned by Mr. Grove.

The *Attorney-General* then concluded his argument by directing the attention of the Court to the evidence.

The witnesses for the defendants were then examined. During the course of the examination of Professor Anderson the Vice-Chancellor suggested that it was unimportant to adduce evidence of what had taken place anterior to Reichenbach's discovery, as it was admitted he had discovered an oil containing paraffine and other elements by subjecting beechwood tar to his process.

Sir *Fitzroy Kelly*, for the defendants, in answer, said he would show that the obtaining by the gradual low red heat process the products which the plaintiff called paraffine oil from bituminous coal was not new at the date of the patent.

Sir *Fitzroy Kelly* (on the 29th day) addressed the Court

(a) 1 Webster, 207.

(b) 8 Ellis & Bl. 478.

(c) Not reported.

(d) 2 Phil. 333; 2 Webster,

2nd Exchequer, 772.

(e) Not reported.

1864.
 YOUNG
 v.
 FERNIE.
 —
Argument.

on the entire case, and, having pointed out the precise nature of the claim made in the specification, contended that a patentee was bound to point out in his specification what it is, whether products or the means of obtaining products, the things themselves or the process, which he claimed. He was further bound to point out what he claimed as new, and what part of the thing produced, or of the process used, which he claimed as new, and what he did not claim. This was essential in every valid specification, because otherwise a patentee would be establishing his right to a monopoly of a well-known discovery.

In *Morgan v. Seward* (a) it is laid down that "the specification is to warn the public of what is prohibited, and to teach them the invention, and a specification which casts upon the public the labour and expense of experiments is bad."

Stevens v. Keating (b) lays down the rule that a just construction is to be put upon the specification—nothing is to be contended either for or against it, but it must be considered according to the ordinary construction of language upon the whole, and every portion of the language on which a question may arise.

In *Hill v. Thompson* (c) it was laid down that "if the specification seeks to cover more than is actually new and useful, it vitiates the whole, rendering it ineffectual even to the extent to which it might otherwise have been supported." This principle applied to this case, because one branch of the contention here is that at all events part of the plaintiff's invention is new—the paraffine, for instance, or the paraffine oil; but suppose, for argument's sake, that it be so, still if the process claimed as new, or any part of it, was previously known the whole patent is bad. Again, in *Hill v. Thompson* it is laid down, "If the invention be an improvement it must distinctly appear on the face of

(a) 2 Webster, 173, 174, & 175.

(c) 1 Webster, 237, 247, & 249.

(b) *Ibid.* 187.

the specification to be claimed as such, *i.e.*, it must not be claimed as an invention ;” and, further, in that case it was laid down, “ If any material part of the alleged discovery failed the patent is void.”

1864.
YOUNG
v.
FERNIE.
—
Argument.

Again, in *Kay v. Marshall* (a) Lord Cottenham says, “ The claim is introduced for the security of the patentee, that he may not be supposed to claim more than he can support as the invention, lest in describing his invention and the means of performing it, especially in the case of an improvement, he may inadvertently have described something not new, in order to render his description of the improvement intelligible. The claim is not intended to aid the description, but to ascertain the extent of what is claimed as new.”

In *Macfarlane v. Price* (b), an old case, Lord Ellenborough said, “ The patentee in his specification ought to to inform the person who consults it what is new and what is old.”

In *Bramah v. Hardcastle* (c) Lord Kenyon observed, “ Unlearned men look at the specification and suppose everything is new which is there, except, perhaps, things common use.”

In *Carpenter v. Smith* (d), which was an action for the infringement of a particular kind of lock, Lord Abinger points out the criterion by which the validity of a patent of this nature is to be ascertained. Lord Abinger says (e), “ It is required as a condition of every patent that the patentee shall set forth in his specification a true account and description of his patent or invention, and it is necessary in that specification that he should state what his invention is, what he claims to be new, and what he admits to be old, for if the specification states simply the whole ma-

(a) 2 Webster, 39; s.c. 1 M. & C. 373.

(c) Ibid. 76; s.c. Holroyd, 81.

(d) Ibid. 532.

(b) 1 Webster, 75; s.c. Q. B. 1 Stark, 199.

(e) Ibid. 532.

1864.
 YOUNG
 v.
 FERNIE.
 —
Argument.

chinery which he uses, and which he wishes to introduce into use, and claims the whole of that as new, his patent must be taken as a patent for the whole, and for each particular part, and his patent will be void if any particular part turns out to be old, or the combination itself not new." This ruling of Lord Abinger was adopted after an elaborate argument by the Court, and the patent was held bad.

In *Holmes v. The London and North-Western Railway Company* (a), where the patent was for a turn-table, the patentee not having pointed out what he claimed as new and what he admitted to be old, it was held that the patent was bad. The specification did not, to use the language of the Lord Chief Justice in that case, "describe the nature of the invention directly or in such a way as that those who read the specification with common ordinary understanding, and fairly read it, may see what is new and what is old." Applying that doctrine to this case, the plaintiff's patent could not be sustained.

Again, in *Tetley v. Easton* (b) it was laid down that a specification must, unless a contrary intention appears, be deemed to claim all that it describes, not only as a whole taken in combination, but also all the essential points of which such combination is composed. Lord Campbell in that case expressed himself to the same effect. But, in order to save the multiplication of authorities, he would read the following passage from Mr. Hindmarch's treatise:—"If the specification describes more than the invention itself, it must clearly point out which of the things described are old and which of them are new; and if the subject of the patent privilege be an addition to or an improvement upon an old machine or other article, the specification must not describe the whole machine or article without distinguishing between the old and new parts, for

(a) 12 C.B. 831; s.c. *Macrory*,
Cases, 14, 26, 28, and 29.

(b) *Macrory*, 82; s.c. 2 *Ellis &*
Bl. 956.

the proviso in the patent requires that the invention not only be ascertained, but ascertained with particularity; and it is impossible to contend that an invention is so ascertained by a specification if it describes without distinction many things which are old as well as the invention itself."

See also *Crossley v. Potter* (a), *Turner v. Winter* (b), *Rex v. Wheeler* (c).

Again, a patent is void when other persons than the patentee have previously for purposes of profit used the same process to obtain the same products: *Cornish v. Keene* (d), *Gibson v. Brand* (e), *Carpenter v. Smith* (f). In the latter case the ruling of Lord Abinger was approved by the whole Court. *The Househill Company v. Neilson* (g) and *Heath v. Unwin* (h) were to the same effect. It was here in evidence that at least two persons had for a series of years been using the same process as the plaintiff's to obtain the same products. *Stead v. Williams* (i), *Honiball v. Bloomer* (j), and *Heath v. Smith* (k) were also cited.

Lastly, it was settled on principle that a patent for the obtaining of certain products by a particular process from bituminous coal cannot be supported if it appear that another person has obtained the same product by a similar process from shale.

Brooke v. Aston (l), *Bush v. Fox* (m), *Harwood v. Great Northern Railway Company* (n), *Horton v. Mabon* (o), *The Patent Bottle Envelope Company v. Seymer* (p), *Ormson v. Clark* (q), *Lewis v. Marling*, and *Jones v. Pearce*.

The learned counsel then called attention to the question

1864.
YOUNG
v.
FERNIE.
—
Argument.

(a) Mac. 253.

(b) 1 Web. P.C. 80 & 81.

(c) 2 B. & Ald. 345.

(d) 1 Web. 507, 509, 511, 512,
and 519.

(e) Ibid. 628—630.

(f) Ibid. 534.

(g) Ibid. 718.

(h) 2 Web. 219.

(i) 2 Web. 136.

(j) Ibid. 199.

(k) Ibid. 268.

(l) 8 Ell. & B. 478.

(m) 1 Macrory, 164.

(n) 2 B. & Smith, 194.

(o) 12 C.B. (N.S.) 437.

(p) 5 C. B. (N.S.) 164.

(q) 32 L. J. (C.P.) 8.

1864.
 YOUNG
 v.
 FERNIE.
 Argument.

of the infringement, and concluded his argument on the 31st day.

[The VICE-CHANCELLOR said that he required no reply as to that part of the case which related to the extracts and previous publication.]

Mr. *Grove*, in reply, submitted that the fallacy of the defendants' case lay in applying subsequent knowledge to an anterior state of facts, and, secondly, in assuming that the legal maxim, *Omne majus in se continet minus*, applied to scientific discoveries. One man might anticipate in general terms what a subsequent discoverer reduced to a definite practical form which ensured reproduction. Leland undoubtedly saw the planet Neptune centuries before, but that did not detract from the credit due to Le Verrier and Galle. The discoverer who first gave definite information sufficient to ensure reproduction was able to support a patent for discovery.

In *Hill v. The London Gaslight Company* (a) the main question was whether the patent was too general. It certainly was more general than Mr. Young's, but the Court, having reviewed the case of *Bush v. Fox*, sustained the patent.

In *Betts v. Menzies* (b), where the objection was similar, the House of Lords, reversing the decision of the Court of Queen's Bench, supported the patent. *Muntz v. Forster* (c), the yellow metal patent, laid down the same principle. But, as his Honour had observed, there was a distinction between chemical patents and mechanical patents: chemical patents depend on the molecular action of matter, and cannot be predicted *a priori*. A brush that will brush a coat will brush a waistcoat; but, except by experiment, it cannot be known that nitric acid will have the same effect upon soda that it has upon potash. The law of application to analogous substances of a similar process does not apply

(a) 5 H. & N. 312.

(c) 2 Web. 106.

(b) 10 H. of L. C. 117.

to chemical patents: *Steiner v. Heald* (a), *Booth v. Kennard* (b). The case of *Calvert v. Ashburn* (c), which was relied on by the defendants, had no application to this case, because there the patentee by a mistake claimed what was known to be old.

1864.
YOUNG
v.
FERNIS.
Argument.

Again, it was said that the plaintiff's discovery was really a discovery of the value of boghead coal; but, supposing that were so, the patent was valid. He produced by a known chemical process a better and cheaper and more abundant product. That was exactly the case of *Crane v. Price* (d), so that even on the defendants' own showing their case failed.

Again it was objected that the plaintiff's specification was not sufficiently accurate and precise; but here quite sufficient was stated to enable a person of ordinary understanding to perform the operation: *Stevens v. Keating* (e), *Russell v. Cowley* (f), *Neilson v. Harford* (g), and *Beard v. Egerton* (h).

An infringement of part of a patent is an infringement of the whole: *Lister v. Leather* (i). Nor does an abandonment of a part of an invention destroy the right to a patent: *Jones v. Pearce* (j), *Lewis v. Marling* (k), *Re Newall v. Elliott* (l).

It is not necessary that the infringer should exactly follow the patent: *Jupe v. Pratt* (m), citing *Crossley v. Beverley*.

Galloway v. Bladen, 1 Web. 529, was also cited.

THE VICE-CHANCELLOR:—

The main objection to the validity of the plaintiff's patent is that both as to the process and the material there is nothing new, and that the specification indicates

Judgment.

(a) 6 Ex. 607.

(b) 1 H. & N. 527.

(c) Not reported.

(d) 1 Web. 409.

(e) 2 Web. 187.

(f) 1 Cr. M. & R. 864.

(g) 8 M. & W. 806; 1 Web. 328.

(h) 8 C. B. 165.

(i) 8 Ell. & B. 1004.

(j) 1 Web. 124.

(k) Ibid. 491.

(l) 4 C. B. (N. S.) 269.

(m) 1 Web. 146.

1864.
YOUNG
v.
FERNIE.
Judgment.

nothing which was not publicly known and publicly used before the date of the patent.

It appears from the evidence that for very many years before the discovery of the substances now called paraffine and paraffine oils the distillation of coals and bituminous substances, at every variety of temperature, had been well known and practised for the production of tars and oils which had been used for lubrication of the ruder kinds of machinery and for burning. It is certain that the discoveries by Reichenbach of paraffine, naphthaline, and various other distinct substances, as products from the carbonisation of animal tar, vegetable tar, and coal tar, about the year 1832, were hailed by men of science as important discoveries. In one passage of his writings, as printed in the Extracts before the Court, Reichenbach says, "There must necessarily be several ways and means of getting at a body of so strong a constitution as paraffine, when mixed up with others so easily decomposed as those which we will for the present consider under the collective denomination of empyreumatic oils. I have come upon the track of some of these ; others, perhaps better ones, the future will discover."

It is certain that Reichenbach, although he ascertained the existence of paraffine in coal, did not indicate coal of any kind as the material capable of producing paraffine or paraffine oils in most abundance. There is ample evidence that the attention of practical chemists was previously to the date of Young's patent laboriously directed to discover the proper material and the proper means of producing these articles in sufficiently large quantities for commercial purposes. Amongst others, Hompesch's patent was obtained in 1841 for obtaining oils from schist or clay slate and asphalte ; and his memorandum of alteration is made for the purpose of confining it to "other rocks or minerals containing bitumen or bituminous substances." Dubuisson's patent, granted in 1845, is remarkable for its recital that in England all attempts to make bituminous

schistus useful had failed. His specification claims a particular apparatus and process, and it states that the presence of paraffine is scarcely perceptible in bituminous stone, asphalte, or other bituminous mineral substances, and that it is in schistus it is contained in the largest proportion.

1864.
YOUNG
v.
FERNIE.
Judgment.

There is no evidence of any specification, of any patents, or any publication in which cannel coal, or coal which produces olefiant and other highly illuminating gases in considerable quantity, was indicated as the class of materials, among the wide range of animal, vegetable, and mineral substances, which, subjected to a proper process, would produce paraffine and the oils called by Young paraffine oils in large quantities, so as to create a manufacture for commercial purposes, till Young's specification was published. Cannel coals had been tried by many, but without success.

Among the many practical and manufacturing chemists who had been vainly attempting to find out how to manufacture paraffine oils and paraffine, so as to supply the market, none had been fortunate. The fair result of the immense load of evidence in this case shows the prevailing opinion to have been that not coals of any kind, but shales or schists properly so called, were the best material. The witnesses of the defendants give evidence which seems convincing on this subject.

Mr. Kirkham, a practical and manufacturing chemist, has proved that from the year 1845 he had been making experiments on what he calls crude oil, and the distillation of various kinds of coals, including cannel coals, at a temperature of something like 700 degrees of Fahrenheit, for the purpose of ascertaining what oil they would produce; but that he could not succeed in getting quantities of oil from these various kinds of coal of any commercial value, although he distilled in large quantities. The results he obtained from cannel coals he found little better than from Newcastle coals. This witness, who states these

1864.
YOUNG
v.
FERRIS.
—
Judgment.

facts, states also, with perfect confidence, that there is nothing new in Young's specification, and nothing described in it which he did not know before. This statement is true, in this sense, that it was well known that coals, cannel coals, as well as every other animal, vegetable, or mineral production, could be distilled at any temperature within a very wide range, and would produce paraffine and paraffine oils. But it is not true, in this sense, that he knew before he read Young's specification which class of substances, among many, and which temperature in a wide range, and which process, among many, would supply the commercial world and the public with a class of paraffine and paraffine oils which so many were in vain seeking to supply, till the manufacture of Young had supplied it. From the evidence of this witness, and the evidence of Fisher, a practical and manufacturing chemist, and the evidence of Parkes, a very intelligent witness, it appears, when accurately weighed, that these persons, like many others, were unsuccessfully attempting to manufacture paraffine oils and paraffine for commercial purposes. Fisher, in particular, seems to have been working for years extensively to produce paraffine oils of a quality to supply the market. He distilled shales and coals of various kinds, including boghead itself, in considerable quantities. He states that he was largely engaged in the manure trade, and has had by him as many as one thousand or two thousand gallons of oils, produced, as he says, from "coals, shales, cannels, and different things." He supplied the other witness, Parkes, with oils, out of which he extracted paraffine; and, according to Parkes's statement, the total amount supplied to him at various times during several years was not less than one hundred gallons altogether.

Parkes also was engaged in experiments as to the production of burning oils and paraffine from shales and coals, with a view to perfect a manufacture, for which, if he could have succeeded, he says he wished to obtain a patent.

1864.
 YOUNG
 v.
 FERRIS.
 —
Judgment.

Experimentally he had gone so far as to produce small pieces of candle and night lights. This witness, who seems an intelligent person, employed Fisher, and gave him instructions and suggestions as to the distillation of shales, and coals, and cannels for the production of paraffine oils. But it is needless to go farther than this evidence, produced by the defendants of these three persons, Kirkham, Fisher, and Parkes, the most important practical witnesses of the defendants, for clear proof that they, like so many others, were laboriously endeavouring to effect, and entirely failed in effecting, the discovery made by Young. They did not discover that cannel coals and other coals which yield olefiant and other highly illuminating gases were the proper material.

The completeness of the failure is demonstrated by two facts—first, that the oils sent by Mr. Fisher to the Great Exhibition of 1851 were rejected and refused a place on account of their objectionable quality and offensive smell; and, secondly, that after Young's patent, in Fisher's correspondence with a person named Clift, it is stated by the latter that Young could not make the oil so good from coals, and would direct his attention to the native bitumens; and a question is asked as to whether Fisher would work his retort beyond a cherry red.

This correspondence is in May, 1851, and it affords ample evidence that the material, and the process, and the temperature indicated by Young were not those used or practised by them.

Each of these three witnesses, like most of the others for the defendants, says that Young's specification contains "nothing new." No doubt this is true in the sense which I have already distinguished. But it is not true in the sense in which the law requires that the word "new" should be used and understood on the question to be decided in this cause. Mr. Parkes states that he was asked by Mr. Fisher to go to Scotland as a witness against the plaintiff Young,

1864.
YOUNG
v.
FERNIE.
—
Judgment.

in an action in which the validity of the patent was contested on grounds similar to the most material in the present case; but he declined to go, for this good reason, that he considered Young ought to succeed as the first public introducer of the manufacture.

Turning now to the men of science who have supported the defendants' case by their testimony, Dr. Alfred Swaine Taylor stated that the amount of olefiant gas is no criterion of the quantity of paraffine that any particular coal will yield. But in his cross-examination he admitted that he did not examine the quantity of olefiant gas in the coals, and that he had made no experiments as to whether coals yield olefiant gas in the same ratio as paraffine. He admits that he was not aware before Young's patent that paraffine could be extracted from coal in merchantable quantities. He says that although he knew paraffine was extracted from coal, yet Young's patent process came upon him as a novelty, and that it was a new thing to hear of it in the quantity which Young produced.

Dr. Anderson, who is another of the defendants' important scientific witnesses, is remarkable for his change of opinion on the question of novelty. He was one of the witnesses for Mr. Young in the Scotch cause. His report made with reference to that case is at variance with his evidence now given. He has stated the cause of his conversion to be the knowledge he had since acquired by what he had read of Selligie's works, and in the specification of Happey's patent, and in Black's Elements of Chemistry. When these writings are looked at his reasons and explanations as to his change of opinion appear to be so very lame that the value of his evidence is reduced to a low degree.

He and the other scientific witness, together with workmen and others who gave evidence and a narrative of experiments on the questions of temperature and materials,

seem to me to have afforded no real assistance to the defendants' case.

Experiments conducted for the express purpose of manufacturing evidence for this cause are to be looked at with distrust.

As to the many witnesses produced to prove that bog-head coal is a "shale;" that all cannel coals are shales; that Kimmeridge shale is coal; that Leeswood curly cannel coal is not a shale, although other cannel coals are shales; that the manufacture of offensive and unmarketable oils from Kimmeridge shales was a manufacture of Young's oils, and an anticipation of his invention; that the tar and coke ovens used in South Wales to produce a coarse tarry oil, used for lubricating the wheels of tram-waggons, was an anticipation of Young's lubricating paraffine oils—all the immense mass of evidence which the defendants have laid before the Court on these various points failed to produce any serious effect upon my mind towards establishing the case of the defendants, and a reconsideration of it satisfies me of its unimportance.

On the question of temperature, as described in Young's specification, there has been in the evidence and arguments on behalf of the defendants some confusion between the heat applied to the outside of the retort and the heat of the materials within. There has been a great conflict of evidence, but the result of a careful review and estimate of the evidence leaves my mind satisfied that Young's specification has given the proper directions, and described the proper gradation and limit of the temperature, up to and not exceeding a low red heat on the outside of the retort, for producing paraffine oils and paraffine in the greatest abundance which has yet been obtained.

On the question of infringement, as well as with reference to the validity of the patent, the defendants have laboured to show by evidence that a temperature lower than a low red heat, and therefore not according to

1864.

YOUNG
v.
FERNIE.*Judgment.*

1864.
 YOUNG
 v.
 FERNIE.
 —
Judgment.

Young's specification, is that at which they have worked, and is the best temperature for producing paraffine oils and paraffine in the greatest quantity and of the best quality. Their evidence has entirely failed to establish the fact that they have not used for their manufacture the same class of coals and the same gradation and limit of temperature which Young describes, or that a gradation and limit of temperature lower than Young's is the best. The evidence remains unshaken on this point, and on the other main points of the case the evidence of the plaintiff's witnesses has been clear and strong, and greatly outweighs that of the defendants.

In dealing with the case it has seemed to me better to direct attention to what has been said by the witnesses of the defendants.

One of these, Dr. Taylor, admitted that there are many chemical substances produced, not in abundance, but in small quantities, which, if they could be produced in large quantities, so as to be merchantable commodities, would be highly valuable. This is the proposition which seems to be at the root of the plaintiff's case. In the case of monopolies, Lord Coke says (*a*) that all monopoly patents were void both by common law and the statute, unless they were granted to the introducer of a new *trade* or engine. The words of the statute of James the First are, "The sole working or vending of any manner of new *manufactures* within this realm, to the true and first inventor and inventors of such manufactures."

Mr. Fernie, one of the defendants, has adduced in evidence a passage from the work of an eminent American chemist, Dr. Antisell, who holds an important position in the Patent Office of the United States of America. It appears that the plaintiff Young has obtained a patent in the United States for his manufacture. This book contains a short history of the manufacture of paraffine oils and

(*a*) 11 Reports, 84.

paraffine; and it gives the following extract from a publication by Reichenbach in 1854:—"So remained paraffine until this hour, a beautiful item in the collection of chemical preparations, but it has never escaped from the rooms of the scientific man." Something, therefore, remained to be ascertained, in order to the useful application of this article for economical and commercial purposes. This illustrates the important distinction between the discoveries of the merely scientific chemist and of the practical manufacturer who invents the means of producing in abundance, suitable for economical and commercial purposes, that which previously existed as a beautiful item in the cabinets of men of science.

What the law looks to is the inventor and discoverer who finds out and introduces a manufacture which supplies the market for useful and economical purposes with an article which was previously little more than the ornament of a museum.

It has been established to my satisfaction, by the evidence in this cause, that the plaintiff Young is an inventor of this class, and that his patent is entitled to the protection of the law. I find that he has ascertained, by a course of laborious experiments, a particular class of materials among many, and a particular process among many, which has enabled him to create and introduce to the public a useful manufacture, which amply supplies the market with that which, until the use of the materials, and process, and temperature indicated by him, had never been supplied for commercial purposes. At the date of his patent something remained to be ascertained which was necessary for the useful application of the chemical discovery of paraffine and paraffine oils. This brings it within the principle stated by the Lord Chancellor in the late case of *Hill v. Evans*.

The manufacture, with the materials and process indicated by him, according to the sense in which I understand the word "manufacture" to be used in the

1864.
YOUNG
v.
FERNIE.
Judgment.

1864.
 YOUNG
 v.
 FERNIE.
 —
Judgment.

statute, was a new manufacture, not in use at the date of his patent.

The principle upon which the present case should be decided is, to my mind, so clear that it is unnecessary to examine the cases cited by the defendants' counsel. Inventions in mechanics are as widely different from inventions in economical chemistry as the laws and operations of mechanical forces differ from the laws of chemical affinities, and the results of analysis and experiment in the comparatively infant science of chemistry, with its boundless field of undiscovered laws and undiscovered substances. This observation, as applied to reported cases, will strike the mind of every lawyer who has even a slight elementary knowledge of both sciences. But if it had been necessary to examine the authorities, there are to be found in them some propositions as to what amounts to a publication, and whether the use of a lock of peculiar and improved construction upon a gate is notice to the public of the nature of the improvement, which would perhaps deserve serious consideration. It is not, I think, the habit of mankind to go about examining the construction of the locks on their neighbours' doors or gates. Even the few men endowed with an honest curiosity in examining mechanical inventions would probably not be anxious to be found taking models of their neighbours' locks, or prying into the exact construction of fastenings intended to protect private property against the whole body of the public.

But whatever may be the correct view of the law on that subject, the principle which seems to me to govern the present case is broad and clear. Twice already has the validity of this patent been established before tribunals of high authority—first, before the Lord Chief Justice of England and an English jury; next, before the Lord President of the Court of Session in Scotland and a Scotch jury. All the most important parts of the evidence before

me were laid before these tribunals. I recognise in the Lord President's charge to the jury a just view of the law. If my own mind had not been well satisfied upon it, I should have hesitated long before I ventured to dissent from these two decisions.

The conclusion is, that I find in favour of the plaintiffs upon all the four issues, and there must be a decree in favour of the plaintiffs, with costs to be taxed and paid by the defendants.

His Honour subsequently directed an account and inquiry in the usual terms.

1864.
YOUNG
v.
FERNIE.
Judgment.

EDWARDS-WOOD v. BALDWIN.

1863.
Dec. 3.

THIS was a motion for an injunction to restrain an action at law which had been commenced on a bond, dated the 19th of December, 1862.

The bill alleged that the plaintiff, William Edwards-Wood, being the owner of large estates near Warwick, in the year 1856 commenced making various improvements on his property, and, having let his residence, went to reside at the hotel kept by the defendant, Leonard Baldwin, at Warwick, and continued to reside there until the month of March, 1862. During that period the plaintiff was often absent from the hotel, and his servant often remained there to superintend the works which were in progress upon the estates, and the defendant, as the plaintiff alleged, frequently paid money for or on account of the plaintiff for wages, rates, and other matters, and at various other times made advances of money to the plaintiff, who, as he alleged, made advances

On a bill by the plaintiff, who while lodging at an hotel, and seriously ill, executed a bond to the landlord for 1000*l.* payable at six months' date, to secure moneys paid and advanced for the plaintiff for hotel charges, the landlord undertaking to rectify all errors in the accounts, the Court restrained an action at law on the bond, the plaintiff giving judgment for the amount of the claim.

1863.
EDWARDS-
WOOD
v.
BALDWIN.

Statement.

and payments to the defendant by cheques and otherwise to the amount of 800*l.* and upwards.

In December, 1862, the plaintiff was suffering under acute inflammation of the lungs, which confined him to his bed for twelve weeks, and being in a dangerous state and not expected to live, his medical man gave strict orders that he should not be disturbed. Notwithstanding this, on the 19th of December, as the plaintiff alleged, the plaintiff's servant came into plaintiff's bedroom and told him that the defendant (Baldwin) and Mr. Smith, his solicitor's clerk, desired to see him. They were admitted, and Mr. Smith immediately said he had come relative to the defendant's account, that the defendant had no wish to put the plaintiff to any inconvenience, but that he (Smith) had arranged to get the defendant some pecuniary accommodation, and to enable him to carry that out he had brought with him a bond for 1000*l.*, payable in three months. The plaintiff could only speak in a whisper, but he objected to the shortness of the period. Upon this Smith said he would make the bond for six months and for 1000*l.*, but that Baldwin should give to the plaintiff a memorandum, so that the bond should stand as a security for so much as should be found due on the delivery of Baldwin's cash accounts, which Smith promised should be made out forthwith and delivered to the plaintiff. Mr. Smith added that the plaintiff should have free access to the defendant's books to satisfy him of what was the balance really due. The plaintiff then signed the document presented to him by Smith, and Smith wrote and gave to the plaintiff a memorandum, signed by the defendant, as follows:—

“19th December, 1862.

“Mr. William Edwards-Wood having this day given me a bond to settle all accounts which I have against him,

I promise to rectify any error which may be found in such accounts, if any.

"LEONARD BALDWIN."

1863.
EDWARDS-
WOOD
v.
BALDWIN.
Statement.

It appeared from the evidence that no debtor and creditor account was rendered by the defendant, but in January the defendant's solicitor wrote demanding payment of the amount secured by the bond, and the plaintiff not having replied to the communication, the defendant's solicitor sent a second and more peremptory letter demanding payment of the principal and interest.

The plaintiff having promised a speedy settlement, and that the account should be investigated immediately, went to Warwick on the 30th June, and saw the defendant, but was not permitted to see the accounts.

On the 7th July, in reference to the plaintiff's claim to see the accounts, the defendant wrote as follows:—

"You have the bills in your possession. I cannot therefore allow my books to be inspected without just cause."

The plaintiff again went to Warwick to inspect the books, but without success.

On the 11th July, 1863, the defendant commenced an action against the plaintiff for the amount due and interest at five per cent.

The bill prayed that an account might be taken of all sums due from the plaintiff to the defendant, and of all sums paid and advanced by the defendant to or on account of the plaintiff, and of all sums paid and advanced by the plaintiff to or on account of the defendant, and that the balance due on such several accounts might be ascertained, the plaintiff being ready and willing to pay any balance which should be found due from him to the defendant. The bill further prayed that the bond might stand as a

1863.
EDWARDS-
WOOD
v.
BALDWIN.
—
Statement.

security for the amount of such balance as might be found due, and for an injunction to restrain the further prosecution of the action.

The defendant in his affidavit denied that the plaintiff had ever made any advance of money to him, and said the only sums which he had received were in payment of accounts rendered. He denied that it had been agreed that the bond should stand only as a security for so much as should be found due on delivery of his cash accounts, and he alleged that at the interview in December, 1862, the plaintiff admitted that he had received the accounts, but had not had time to look over them, though he had no doubt they were correct, and that he must ask the defendant to give him a memorandum that if he (the plaintiff) found any error it should be rectified. The defendant further deposed that he thereupon gave the plaintiff the memorandum above mentioned. He also stated that fully detailed accounts had been delivered to the plaintiff prior to the date of the bond, amounting to 1025*l.* 3*s.* 7*d.*, and that it was understood that there should be two other small accounts furnished, amounting to 18*l.* 19*s.* 2*d.*, making together the sum of 1044*l.* 2*s.* 9*d.* He deposed further that at the time the bond was given he (the defendant) held bills of exchange given by the plaintiff for 170*l.* and 300*l.* which had been dishonoured, and one for 600*l.* which had not arrived at maturity, making together 1070*l.*, all of which had been given up when the bond was executed. The defendant deposed that the plaintiff was indebted to him in the sum of 1048*l.*, with interest on the bond, and that such sum was due for hotel bills extending from the 4th February, 1859, to the 6th October, 1862, and for 270*l.* cash lent and advanced to the plaintiff since the 4th February, 1859.

Argument.
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Mr. *Malins* and Mr. *J. H. Taylor*, for the motion, contended that there was here, on the defendant's own showing

such a complicated account as could only be properly taken in this Court.

Mr. *Greene* and Mr. *R. Hawkins* opposed the motion and contended that there was no equity on which this bill could be sustained. The claim of the defendant was a simple money demand, viz., a claim for the amount of the plaintiff's bill for hotel charges and for money lent. It was a common money demand, and if this bill could be supported every tradesman might be dragged into a Chancery suit for requiring payment of his bill, or, if he were so inclined, might involve any customer in a Chancery suit to obtain payment. There was no pretence for any proceedings in this court; there was nothing complicated in the nature of the transaction; there was nothing fiduciary in the relation of the parties, no question of agency—in short, there was no motive for this suit but to delay payment of a just demand.

They cited *Phillips v. Phillips* (a) and *Smith v. Leveau* (b).

The VICE-CHANCELLOR:—

The injunction asked for must be granted. This is not a case where the receipts and payments are all on one side, for the plaintiff has received moneys from the defendant, and the defendant from the plaintiff, and the defendant has received not only moneys, but also bills of exchange. The observations made by Lord Justice Turner (overruling Vice-Chancellor Wood) in the case of *Phillips v. Phillips* certainly do not appear quite reconcilable with decisions in other cases. But, even according to the view taken by the Lords Justices in the recent case of *Smith v. Leveau*, nothing was said to cover a case like the present, where the defendant in his own affidavit has

1863.
EDWARDS-
WOOD
v.
BALDWIN.
Argument.

Judgment.
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(a) 9 Hare, 471.

(b) 1 Hem. & M. 123, reversed on appeal; 2 De G., J., and F. 1.

1863.
EDWARDS-
WOLLD
v.
BALDWIN.
Judgment.

introduced a long and confused statement of complicated transactions in which there were receipts and payments upon both sides, as to which the defendant does not say that any vouchers were produced and signed to show that an account had been settled and signed between the parties.

It is also a very unfavourable feature in the case of the defendant that, contemporaneously with the bond given by the plaintiff, a memorandum was signed by the defendant and given to the plaintiff, the language of which, though equivocal, amounts to nothing more than an assurance that the bond was given as a security, and contemplated a further investigation of the accounts. The natural construction of the language of that memorandum is, that the bond was certainly given as a security for what should be found due after an investigation of the accounts, in which errors might appear, and when the balance had been adjusted for which it should stand as a security. Even if the language does not bear that construction, it is impossible to say that the memorandum did not contemplate that an opportunity should be given to the plaintiff to point out any errors in the account, no vouchers having been at any time given by the defendant, but merely bills of the current expenses of the plaintiff at his hotel, which the defendant had offered to give to the plaintiff.

All that is not enough to deprive the plaintiff of that to which upon the transactions on both sides he is entitled, namely, an investigation of the accounts. As to the question of jurisdiction, nothing has yet been done by any Act of Parliament to take away from this Court its inherent jurisdiction to deal with such a case as this. The plaintiff is entitled to an injunction, but he must give judgment for the whole amount claimed by the defendant, and the defendant must submit to such order as this Court may direct,

1863.

CAREW v. COOPER.

Dec. 5 & 8.

THIS was a motion on behalf of the defendant to dissolve an injunction which had been granted by the Court, on the application of the plaintiff, the executor of a Major Master, restraining the defendant from receiving his pension and annuity.

The defendant, Charles Cooper, was formerly a major in the service of the East India Company, and under the Transfer Act (21 & 22 Vict. c. 106), which was passed in 1858, became an officer in the service of Her Majesty.

On the 31st December, 1861, he retired on his colonel's half-pay, which consisted of a pension of 450*l.* per annum (less 40*l.* deducted for the military fund), and of an annuity of 200*l.* per annum, payable under an order made by the Secretary of State for India in council, which was published in the *Gazette* for the 12th August, 1857. The order directed that certain annuities, at the rates therein mentioned, be offered to lieutenant-colonels and majors, as they stood regimentally in the cavalry and infantry of the three presidencies, in addition to the pensions to which they might be entitled under the regulations of the service.

On the defendant retiring his commission was granted to him in pursuance of the statute (25 & 26 Vict. c. 4) intituled "An Act to enable Her Majesty to issue Commissions," and was as follows:—

The Statutes of the 46 Geo. 3, c. 69, & 47 in Geo. 3, c. 25, do not apply to pensions granted by the government of India to military persons employed in India for the purpose of the Indian government. Therefore an assignment by an officer in the service of the East India Company, who, under the Transfer Act, 1858, became a colonel in the Queen's service and retired on his pension of 450*l.*, and an annuity of 200*l.* per annum, and afterwards assigned the same as security for a debt—*Held*, valid.

"Victoria, by the grace of God, &c. To our trusty and well-beloved Charles Cooper, Esq., greeting. We, reposing especial trust in your loyalty, &c., do, by these presents, constitute and appoint you to have the honorary rank of colonel in our army from the 31st December, 1861, and we do hereby give and grant you full power and authority

1863.
 CAREW
 v.
 COOPER.

Statement.

to command and take your rank accordingly, &c. Given at our Court at St. James's, &c., this 8th day of June, 1862."

Prior to April, 1862, an action had been brought against Colonel Cooper by Major W. Master, and a verdict recovered against him for a sum of 2813*l.* 10*s.* 8*d.* for principal moneys and costs.

On the 30th April, 1862, Colonel Cooper assigned to Major Master the annual sum of 100*l.*, part of the said pension of 450*l.* (less 40*l.*) and annuity of 200*l.*, for a period of eleven years, if the assignor should so long live. The said indenture also contained a power of attorney to Major Master, to use the name of Colonel Cooper, and in his name to demand, sue for, and give receipts and discharges for the said annual sum of 100*l.* in quarterly payments.

Notice of this assignment was on the 28th May, 1862, served on the Secretary of State for India, in reply to which notice the following letter was received:—

"India Office, S.W., 17th June, 1862.

"Gentlemen,—I am directed by the Secretary of State for India in council to acquaint you, with reference to the notice of assignment by Colonel C. Cooper of a portion of his pension to Major Whalley Master, lodged by you at this office, that assignments of military pensions are not recognised by this department, but that these pensions are paid either to the officers to whom they were granted, or to their duly constituted attorneys.

"I am, gentlemen, your obedient servant,
 "J. COSMO MELVILL."

On the 12th October, 1862, Major Master died, having appointed the plaintiff his executor.

An instalment of 25*l.* fell due in February, 1863, and

not being paid, the plaintiff filed this bill for the purpose of enforcing his security and for an injunction to restrain the defendant from receiving the pension.

The defendant on the 18th July last was adjudicated a bankrupt, and the official assignee, Mr. H. H. Cannan, was appointed official assignee and was subsequently made a defendant. No creditors' assignee had been appointed. On the 15th of October he obtained his discharge.

When the motion came on, on the 5th, the official assignee had not been served, and it stood over to allow such service to be made.

Mr. *Roxburgh* now moved to dissolve the injunction. It had been settled by a series of decisions in this court that by the 47 Geo. 3, sess. 2, c. 25, s. 4 (which was identical with the 46 Geo. 3, c. 69, s. 7), an assignment of a military pension was absolutely null and void: *Lloyd v. Cheetham* (a). It was contended that this Act was confined to pensions of officers in the Queen's service, and that the defendant did not come within that class, and *Heald v. Hay* (b) was relied on, but that very case pointed out the distinction. In *Heald v. Hay* the officer was not in the Queen's service, and the pension had been granted by the East India Company before the passing of the 21 & 22 Vict. c. 106, but in the present case before this pension was granted Colonel Cooper became an officer in Her Majesty's service, and as such became entitled to his retiring pension. It was submitted, therefore, that this case was within the authority of *Lloyd v. Cheetham*, that the distinction it had been attempted to take between the two cases failed, and that the injunction must be dissolved.

The retiring pension of an Indian officer does not pass to his assignees in bankruptcy. *Gibson v. The East India Company* (c), Statutes 21 & 22 Vict. c. 106, ss. 39, 43,

(a) 3 Giff. 171. (b) 3 Giff. 467. (c) 5 Bing. (N. C.) 262.

1863.
CAREW
v.
COOPER.
Statement.

Argument.

1863.
 CAREW
 v.
 COOPER.
 —
Argument.

56, 58, and 24 & 25 Vict. c. 134, s. 134, were also referred to.

Mr. *Malins* and Mr. *Bagshawe* for the plaintiff and Mr. *H. Stevens* for a second incumbrancer were not called on.

The VICE-CHANCELLOR:—

Judgment.
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The two sections of the Acts of Parliament which have been referred to—the 7th section of the 46 Geo. 3, c. 69, and the 4th section of the 47 Geo. 3, c. 25—are peremptory enactments annulling assignments of military pay and military pensions, upon the ground of public policy. So highly does the law estimate the principle of public policy upon which these sections proceed that even at common law it has been decided [*Flarty v. Odum* (a), and *Lidderdale v. The Duke of Montrose* (b)] that, independently of these enactments, an assignment of the half-pay of a military officer is invalid, and can confer no right whatever upon the assignee. That has been decided on grounds of public policy, the payment being made to retain the services of a person who has been in the employment of the Government, but who has ceased to be actively employed in its service.

If I had discovered any ground for importing these enactments, or for carrying this principle of law so far as to reach assignments of all pensions and pay, including the pension and pay now in question, I should certainly have hesitated very long before I did anything to sanction the validity of any assignment of the pay or pension of any officer in the service of the Crown.

But the question here is, whether or not the pay and pension which the defendant Colonel Cooper claims are pay and pension of the kind to which these enactments apply. I am of opinion that they are not within these enactments. The pay and pension in question proceed not from a grant of the Crown, or of money to be paid

(a) 3 T. R. 681.

(b) 4 T. R. 248.

through the office of the Paymaster-General, or of anything which is included in the army estimates, or which is under the control of Parliament in that shape. They proceed from funds of an entirely different character.

1863.
CAREW
v.
COOPER.

Judgment.

By the General East India Act of 1858 all the revenues and property of the East India Company were taken out of the control of that company, and were placed, not upon the same footing as the revenues of England, but upon an entirely different footing. That Act of Parliament, sec. 39, enacts that they are to be vested in Her Majesty, not for the purposes of the general government of this country, but to be disposed of, subject to the provisions of the Act, for the purposes of the government of India. That is the special purpose of this enactment, and the 39th section of the Act of 1858 is followed by a series of enactments, commencing with the 41st and ending with the 55th, all of which relate to the revenues of India. So far from the funds out of which this pension is granted and all the funds which are under the control of the Indian Council for the purposes of the government of India being regulated by Parliament, the parliamentary control is only preserved by the 53rd section, which requires that the government of India shall lay before Parliament in every session an account of the way in which they have employed their revenues for the purposes of the government of India. It seems plain that the statutes of the 46 Geo. 3, c. 59, and the 47 Geo. 3, c. 25, do not apply in any degree to pay or pensions granted by the government of India, or to pay or pensions granted to any military person whose conduct is regulated by the government of India, or who is employed in services in India for the purposes of the Indian government. It is very true that the Act of 1858 was passed for purposes entirely different from financial purposes; that it was passed to preserve a direct control in the Crown over the officers employed in the army of India, and to regulate

1863.

CAREW

v.

COOPER.

Judgment.

the discipline of the Indian army under the power of the Crown as a superintending power, instead of under the East India Company as a superintending power—that is to say, the Act makes every officer in the Indian army hold his commission from the Queen. But those officers of the Indian army who hold their commissions from the Queen as this gentleman does, as appears from the commission, are not paid by the Crown in the sense in which the British army is said to be paid by the Crown, which receives the money voted by Parliament through the army estimates. The Acts of the 46 Geo. 3, c. 69, and the 47 Geo. 3, c. 25, seem to apply only to pay received from the Crown out of the revenue voted by Parliament. It was thought necessary, in order to enforce that principle of public policy to which I have alluded, that Parliament should peremptorily enact the nullity of all assignments of the half-pay and pensions of officers who were in the service of the Crown, as contemplated by those two Acts of Parliament. It might have been a very wise thing to import these enactments into the Act of 1858, for the regulation of the Indian army. But I find that Parliament, although speaking in 1858 decidedly as to that which is properly the British army, and not the army of India, and as to moneys which are paid under the direct control and by the direct vote of Parliament, is yet silent as to any such enactments as those above mentioned, and that this principle of public policy is not embodied in an express enactment. I can only consider, therefore, that, probably for wise reasons, it was not thought proper or necessary to apply these enactments to officers who derive their pay and pensions from the revenues of the government of India, and who are not, like the British army, paid through the medium of the Paymaster-General. Therefore I cannot see that the East India Act of 1858, or the circumstance of this gentleman's commission being granted by the authorities at

the Horse Guards and signed on behalf of the Queen, and not by the East Indian authorities, affects the question of the assignment by him of his pension and annuity. That question must be decided by reference to the funds out of which it comes, and whether Parliament has imposed any fetters upon the alienation of any pension and annuity so received. I find no warrant for saying that an instrument which contains such a power of attorney is null and void under the operation of those two sections of the two Acts of Geo. 3.

Mr. Melvill has stated that it is mentioned in the order 905 of 1861 that these payments are in respect of these two items, "retired pay 25*s.* per diem, and special annuity of 200*l.*" The expression "special annuity" is not to be found in the Acts of 46 & 47 Geo. 3 which have been referred to. This is only a small circumstance, but it shows that the pension and annuity now in question are not regulated by the 46 & 47 Geo. 3, and do not proceed from such a source as to be within the operation of those two Acts of Parliament. I cannot therefore dissolve this injunction, and I must refuse the motion. The costs to be costs in the cause.

Mr. *Bacon* appeared for Mr. Cannan, the official assignee, and asked for the costs of his appearing.

[The Vice-Chancellor.—I do not think there has been that diligence on the part of the official assignee to entitle him to his costs.]

1863.
CAREW
v.
COOPER.
—
Judgment.

1863.

Nov. 11.

Where a debtor gave authority by parol to his creditor to take certain goods, passing by delivery, and sell them, and out of the proceeds to retain his debt—*Held*, that the creditor against the administrator of the debtor had a lien on such goods to the extent of his claim.

GURNELL v. GARDNER.

THIS bill was filed by the plaintiff, a creditor of Joseph Gledhill, deceased, praying for a declaration that he was entitled to certain wool and the proceeds thereof as against the defendants, and was entitled to retain the proceeds for his own benefit. The bill also asked for an injunction to restrain an action which had been commenced by the defendants against the plaintiff and for the costs.

The bill alleged that Joseph Gledhill, late of Ashby, in the county of Lincoln, cattle dealer, became indebted to the plaintiff, George Gurnell, a farmer, in the sum of 21*l.* 10*s.*, on account of the proceeds of certain cattle and stock which he had sold for and on behalf of the plaintiff, and also for money lent to him by the plaintiff. The said Joseph Gledhill previously to July, 1862, had purchased of a Mr. Bradley certain wool, for which he paid the sum of 140*l.* in part payment of the purchase-money, leaving a balance due to Bradley. The wool was allowed to remain on Bradley's premises. On the 27th July, 1862, Joseph Gledhill, being then about to leave home to attend a cattle fair, requested the plaintiff during his absence to superintend the weighing, packing, and delivery of the above-mentioned wool, which the plaintiff agreed to do. The balance due to Bradley was 75*l.*, and the plaintiff informed Bradley that the wool was going to be sold, and that he should then receive such balance.

The wool was forwarded to Doncaster by a barge belonging to the defendant John Gardner, who was a wharfinger, and was landed at his wharf. The plaintiff had employed Joseph Gledhill to sell some cattle for him at the above-mentioned fair, which Gledhill accordingly did, and received the proceeds of the sale.

Paragraph 9 of the bill was as follows:—"On the morning of Saturday, the 2nd August, 1862, the plaintiff had an interview with the said Joseph Gledhill, who had then only just returned from the said fair in Yorkshire, at his residence, and the said Joseph Gledhill informed the plaintiff (as the facts were) that he had sold the plaintiff's said beasts, and that one Chatterton had got his money (meaning thereby that he, Joseph Gledhill, had paid away the money produced by the sale of the plaintiff's cattle to Chatterton); and the said Joseph Gledhill, being indebted to the plaintiff as aforesaid, and in consideration of the said debt of 218*l.* 10*s.*, and for the purpose of securing to the plaintiff the payment of part of such debt, and for the purpose and with the intention of assigning and making over the said wool to the plaintiff, and of vesting such wool in the plaintiff, then said to the plaintiff, 'There is the wool which has gone to Doncaster. Go and sell that wool, pay Bradley the balance due to him on such wool, and keep the remainder yourself.'"

At the time of this interview the said Joseph Gledhill was ill in bed, but, as the bill alleged, he knew perfectly well what he was doing. The plaintiff did not see Joseph Gledhill again, as he died in the night of the 2nd August, 1862. On the following Monday, the 4th August, the plaintiff went to Joseph Gledhill's residence, and there met Bradley and one of Joseph Gledhill's brothers, who told him that he was not to sell the wool for the present. The plaintiff, however, and Bradley went to the defendant Gardner's wharf at Doncaster and claimed the wool. They did not then see the defendant Gardner, but they were then informed that a brother of Joseph Gledhill had given directions to Gardner to keep the wool and not to let it go out of his possession.

On the 5th August the plaintiff and Bradley again went to the wharf of the defendant Gardner, took possession of the wool, and sold it at the wool fair at Doncas-

1863.
GURNELL
v.
GARDNER.
Statement.

1863.
GURNELL
v.
GARDNER.
Statement.

ter for 213*l*. On the same day the plaintiff paid to Bradley the balance of 75*l*. which was due to him, and, after paying the freight and wharfage, kept the balance in part satisfaction of the debt due to him by Joseph Gledhill.

It appeared that Joseph Gledhill died intestate, and on the 11th November, 1862, letters of administration were granted to his brothers, John and James Gledhill, the present defendants. They required the plaintiff to pay over to them the amount received by him in respect of the wool, which he declined to do.

In March last an action was commenced against the plaintiff by the defendant Gardner, who held the proceeds, as stakeholder, to recover the sum of 216*l*. 4*s*. for 94½ tods of wool.

On the 15th April the plaintiff filed this bill as assignee in equity for value of the wool, and claimed to be entitled to retain the moneys produced by the sale thereof.

The plaintiff agreed to give judgment in the sum of 218*l*. 4*s*., but on condition that no execution should issue on such judgment until the 8th May, 1863, so that the rights of all the parties should be determined by this Court.

On the 24th April, 1863, Mr. Baron Bramwell made the following order:—

“ Upon hearing the attorneys or agents on both sides, and by consent, I do order that upon payment of 218*l*. 4*s*., being the debt and damages due from the defendant to the plaintiff for which this action is brought, being 2*l*. for damages on the count for trespass, and 216*l*. 4*s*. on the money counts and costs to be taxed and paid on the 8th May next, the plaintiff being at liberty to sign judgment for the said debt and damages and costs forthwith, all further proceedings in this cause be stayed; and I further order that, in case default be made in payment as aforesaid, the plaintiff shall be at liberty to issue execution for the whole amount remaining unpaid at the time of such default, with costs

of execution, sheriffs' poundage, officers' fees, and all other incidental expenses, whether by *fi. fa.* or *ca. sa.*"

1863.
GURNELL
v.
GARDNER.
Statement.

On the 24th April, 1863, the defendant Gardner's solicitor sent to the plaintiff's solicitors a copy of the above order, with the following letter :—

" *Gardner v. Gurnell.*—Enclosed I send you copy order to stay herein, which it is expressly understood shall not in any way prejudice the rights of either party in the suit in Chancery."

It was admitted that nothing was due to the defendant J. Gardner for freight or wharfage, or otherwise, in respect of the said wool. The defendants John and James Gledhill claimed to be entitled to the proceeds, as personal representatives of Joseph Gledhill, deceased, and the action at law was brought by the defendant Gardner as a mere stakeholder, at their instigation and request.

The defendant Gardner on the 22nd April, 1863, demurred to the plaintiff's original bill (which was filed against him alone), for want of equity, on the ground that John and James Gledhill ought to have been made parties.

The plaintiff submitted to the demurrer, and obtained the common order to amend. The defendant Gardner had signed judgment in the action, and threatened to issue execution upon the judgment on the 8th May.

Certain pencil memoranda as to the weight, &c., of the wool, and purporting to give authority to the plaintiff to take it, came out of the plaintiff's possession, and the plaintiff in his affidavit said they were given to him by the intestate at the interview, but this was disputed,

1863.
 GURNELL
 v.
 GARDNER.
 Argument.

Mr. *Malins* and Mr. *Fielding Nalder* opened the case for the plaintiff, but were stopped by the Court.

Mr. *Bacon* (with whom were Mr. *C. T. Simpson* and Mr. *Sterling*), for the defendants, contended that the alleged assignment by parol from Joseph Gledhill to the plaintiff was inoperative. Not being accompanied by delivery of possession, it would have passed for nothing even had Joseph Gledhill been living. At most it was an authority to do something which was revoked by his death.

This was assuming the case made out by evidence, but the only evidence was the plaintiff's oath in his own favour.

They cited *Lepard v. Vernon (a)* and *Watson v. King (b)*.

The VICE-CHANCELLOR:—

Judgment.

Upon the question of fact I think the plaintiff, on the weight of evidence, must be considered as having proved what is alleged in the ninth paragraph of his bill. But the important question in this case is as to the law. I should have considered that an equitable lien can be created by parol, and, subject to what has been said upon the case of *Lepard v. Vernon*, it seems to me that if what the intestate said to the plaintiff had been put into writing, and signed by the intestate, it would have been a perfectly valid equitable assignment, and it would have created an equitable lien wholly irrevocable by the death of Joseph Gledhill.

What was decided in the case of *Lepard v. Vernon* was this, that where there is a bare power of attorney to receive a debt not accompanying any assignment of it, although given by a written instrument under the hand

(a) 2 Ver. & B. 53.

(b) 4 Campb. 272.

and seal of the person giving it, it is no more than a naked authority, and that authority is clearly revoked by death. The authority there given cannot be said to have been by parol. I asked whether Sir W. Grant, in the case of *Lepard v. Vernon*, said anything to show that if the power had embodied a declaration that it was given to enable the creditors to apply the money to their debt (of which there was parol evidence in the case) it would not have operated as against the general creditors of the debtor, and, as I expected, the counsel for the defendants could not say that he did. I find no warrant for departing from the decision in *Lepard v. Vernon*, nor for saying that if what passed by parol had been incorporated into the written instrument Sir W. Grant would not have felt himself bound to hold that the right of the person claiming under the power of attorney, coupled with the declaration, would have prevailed.

In this case everything was by parol. The words are clear; and that, coupled with the conduct of the intestate, amounts to the creation of a valid equitable lien. It seems to me to be impossible to resist the plaintiff's claim on the ground that there was nothing in writing. I know no law which says that a valid equitable lien cannot be created by parol, and the conclusion, if these premises be just, is inevitable, that where all things are by parol and associated together for the purpose of giving an authority, where all is one transaction, and the power and the purpose are coupled together by the same evidence, they operate to confer a valid right which this Court is bound to enforce. At the same time it is impossible to say that the case is free from difficulty.

I wish it, however, to be understood that if what is alleged in the 9th paragraph of the bill had been put into writing and signed by the intestate, I think it would have given a right to the plaintiff which the defendants, the administrators, could not have successfully resisted. Upon

1863.
GURNELL
v.
GARDNER.
Judgment.

1863.

GURNELL
v.
GARDNER.*Judgment.*

the whole, therefore, I am of opinion that the plaintiff is entitled to a declaration that he has an equitable right to the proceeds of the wool.

I shall make no order as to costs. The plaintiff has established his equitable lien, but, having seized and forcibly taken possession of the property as against the legal right of the person in whose custody it was placed, I cannot give him any costs.

1863.

Nov. 19th.

Where the plaintiff composed certain tales for the defendant for publication in the *London Journal*, of which he was the proprietor—*Held*, that the subsequent publication of such tales in a weekly supplementary number, for sale with or without the current number, was a “publication separately” within the meaning of the 18th section of 5 & 6 Vic. c. 45.

SMITH v. JOHNSON.

THIS was a motion to restrain the defendants from publishing in a supplementary number of the *London Journal* certain tales, without the plaintiff’s consent, or the consent of his assigns, which the plaintiff had written for the *London Journal*.

The bill alleged that the *London Journal* is a weekly periodical, consisting of tales of which a part of one or more appears in each number. In or about the year 1849 the plaintiff composed for the *London Journal* three tales, called “Ulrich the Saxon,” “The Heiress,” and “Cromwell, or the Protector’s Oath,” which were comprised under the common title of “The Chronicles of Stanfield Hall,” and were published in the *London Journal* in the same year. On that occasion the plaintiff did not assign or relinquish to the said proprietors of the *London Journal* any of the rights which are granted or reserved to authors by law.

The defendants, the present proprietors of the *London*

Journal, were now publishing weekly what they called a supplementary number of the *London Journal*, which might be had with or without the current number of the *London Journal*, and containing each week parts of several tales. In the supplementary number for Saturday, 27th June, 1863, there was commenced a re-publication of the tale called "Ulrich the Saxon," under the title of "' Stanfield Hall,' by John Frederick Smith, Esq.," and that re-publication had been continued by the appearance of a further part of the same tale in each succeeding supplementary number. In the headings of the supplementary number there was printed in capital letters, "A Re-issue of John Frederick Smith's best Tales, 'Stanfield Hall,' &c."

1863.
SMITH
v.
JOHNSON.
—
Statement.

The plaintiff deposed that he had never given his consent to this re-publication of these tales, but, as he contended, held all his rights in respect of the tales comprised under the title of "Stanfield Hall," in trust for Messrs. Petter & Galpin, of La Belle Sauvage Yard. Those gentlemen on the 6th November instant wrote to the defendants, requesting them to discontinue forthwith the re-publication of the said tales, which, however, they refused to do. The bill alleged that the defendant threatened and intended to continue the re-publication of these tales in the said supplementary numbers of the *London Journal*.

The question was, whether the re-publication was a separate publication within the meaning of the Copyright Amendment Act, 5 & 6 Vic. c. 45. Section 18 was as follows:—

"And be it enacted, that when any publisher or other person shall, before or at the time of the passing of this Act, have projected, conducted, and carried on, or shall hereafter project, conduct, and carry on, or be the proprietor of any encyclopædia, review, magazine, periodical work, or work published in a series of books or parts, or any book whatsoever, and shall have employed or shall employ

1803.
SMITH
v.
JOHNSON.
—
Statement.

any persons to compose the same, or any volumes, parts, essays, articles, or portions thereof, for publication in or as part of the same, and such works, volumes, parts, essays, articles, or portions shall have been or shall hereafter be composed under such employment, on the terms that the copyright therein shall belong to such proprietor, projector, publisher, or conductor, and paid for by such proprietor, projector, publisher, or conductor, the copyright in every such encyclopædia, review, magazine, periodical work, and work published in a series of books or parts, and in every volume, part, essay, article, and portion so composed and paid for, shall be the property of such proprietor, projector, publisher, or other conductor, who shall enjoy the same rights as if he were the actual author thereof, and shall have such term of copyright therein as is given to the authors of books by this Act. Except only that in the case of essays, articles, or portions forming part of and first published in reviews, magazines, or other periodical works of a like nature, after the term of twenty-eight years from the first publication thereof respectively, the right of publishing the same in a separate form shall revert to the author for the remainder of the term given by this Act: provided always, that during the term of twenty-eight years the said proprietor, projector, publisher, or conductor shall not publish any such essay, article, or portion separately or singly, without the consent previously obtained of the author thereof, or his assigns."

Argument.
—

Mr. *Bacon* and Mr. *Westlake*, for the motion, contended that this was clearly a separate publication. It was called a supplementary number, but was for sale singly, and was described as a re-issue of the plaintiff's works.

They cited *Mayhew v. Maxwell* (a) and *The Bishop of Hereford v. Griffin* (b).

(a) 1 J. & H. 312.

(b) 16 Sim. 190.

Mr. *Malins* and Mr. *Speed* for the defendant.

This is not a violation of copyright, because the plaintiff cannot publish the stories in question himself. It is a mere re-publication as of the defendants' periodical, with a simple difference in the order. If this motion could be maintained this would be the necessary result, that the proprietor of a magazine could not reprint his publication if he varied the arrangement in any way. Such was not the true construction of the Act, which merely prohibited a publisher from publishing an article which had appeared in his magazine out of and unconnected with the work in which it first appeared. These defendants were not attempting to do anything of the kind contemplated by the Act.

Secondly, the application came too late. The plaintiff or his cestui que trust had lain by for a year, allowing the defendants to make all their arrangements, and now came forward at the last moment to harass the defendants. It was submitted that the motion must be refused.

The VICE-CHANCELLOR:—

The proviso in the Act of Parliament which prohibits a publication "separately and singly" is a proviso intended for the benefit and protection of authors. This Court in previous cases has, and I think wisely, construed the language of the Act so as to afford that protection which was clearly intended by the Legislature; and that protection being intended, it is the duty of this Court to give the relief now asked. In the case cited before the Vice-Chancellor of England (*The Bishop of Hereford v. Griffin*) it was said in argument that the meaning of the proviso, taken with the whole clause, is not to vest a copyright in the proprietors or publishers of a periodical work, but simply to give them a licence to use the matter for a particular purpose. That was the view adopted by the Vice-Chancellor of England; that was the view subsequently

1868.
SMITH
v.
JOHNSON.
Argument.

Judgment.

1863.
SMITH
v.
JOHNSON.
—
Judgment.

adopted by Vice-Chancellor Wood; and that is the view which, upon the construction of the language of the Act, fortified by these authorities, I feel myself bound to take.

The first part of the clause contemplates a publication of works, called periodical works, in parts, and it contemplates the labour which authors bestow in composing literary works which are to be published as portions of those parts. The words "parts and portions" occurring in this clause are extremely significant, and fully justify the view which this Court has taken in previous cases.

Keeping in view this principle of construction—that the Act of Parliament was intended to give a licence only to the proprietors of periodical works purchasing and paying for a literary composition to be published as a part or portion of a periodical work—the construction of the words in the proviso which prohibit them from publishing these parts or portions which "alone" are the property of the author—from publishing these portions "separately and singly," seems reasonably plain. "Publishing separately" must mean publishing separately from something. What is that "publishing" which the Act of Parliament says shall not be separately made? It must be the publishing of the part or portion separately from that which has been before published. That is the view which has been previously taken, and the language in the case of *Mayhew v. Maxwell* was to the effect that the defendant should be prohibited from publishing the literary work then in question otherwise than as part of the Christmas number of the *Welcome Guest*. Now, that Christmas number was a thing called a "part" in the Act of Parliament, which describes these periodical works as being published in a series of parts and numbers. The Christmas number is part or portion of the other composition. The order of this Court peremptorily prohibited the defendant Maxwell from publishing it separately from the other part or number.

What has the defendant in this case done? He has acquired, under the first clause of the Act of Parliament, an actual property in this literary composition, which is called "The Stanfield Hall Tales," published in portions or parts of a certain periodical work. The Act of Parliament says the publishers shall not publish these portions separately from those parts for the publication of which they have obtained a licence already. What they have done is to print the portions already published of those antecedent parts in what is called a supplementary number, and which may be purchased with or without the number in which the "portions" were originally published. That is a separate publication—separate from the "part" in which it was originally published. To reprint in numbers which may be had with or without the concurrent number of the work is an act not permitted by the Legislature.

As to the argument that the plaintiff has forfeited the right, there is scarcely any pretence for it. But it is said that it will be more convenient to allow the publication to go on, and keep an account of the profits. That is a matter for the parties themselves to decide. The plaintiff is entitled to an injunction.

As to the other argument, that this is a publication conjoined with other works, it cannot, in my opinion, be maintained.

1863.
SMITH
v.
JOHNSON.
—
Judgment.

1864.

*Feb. 28,
March 1, 2, 4,
6, & 7.*

The assent which is necessary to the validity of an agreement in this court must be an assent, uninfluenced by any power which the one party may have of operating on the fears of the other: therefore where an agreement was executed by the one party, the plaintiff, under a threat by the other that the plaintiff's son would, otherwise, be indicted for forgery it was set aside with costs.

Where the plaintiff's main and influencing purpose for entering into the agreement was to relieve his son from exposure, disgrace, and ruin, the intervention of other circumstances or collateral advantages to himself are not enough to sustain the agreement in this court.

BAYLEY v. WILLIAMS.

THE bill was filed by the plaintiff, a coalmaster at Knowle, in the county of Warwick, praying that it might be declared that two agreements, dated respectively the 20th and 22nd April, 1863, and the securities thereby created on the Tipton Colliery and certain other property of the plaintiff, were obtained by the defendants from the plaintiff by undue, improper, and illegal pressure and influence, and without consideration, except forbearance to institute criminal proceedings against the plaintiff's son, and that the said agreements, &c., were given as part of an arrangement for compounding a felony. The bill also prayed for delivery up of the said securities, and for an injunction to restrain the defendants from proceeding at law.

The bill alleged that the defendants were a firm of bankers at Wednesbury, Staffordshire, and were also magistrates for the county. Mr. Thursfield, who took an active part in the transactions impeached, is a solicitor and acting clerk to the magistrates at petty sessions held at Wednesbury. The plaintiff is a coalmaster, and also a farmer, at Knowle, and was entitled in fee simple in possession to the Tipton Meadow Colliery. He began life as a working collier, and, being a man of little education, left his accounts and correspondence to the care of W. W. Wilkes, who was accustomed to answer all business letters, keep all the accounts, and make all entries in the bill book and ledgers. The plaintiff himself rarely answered business letters. For many years he kept a banking account with the defendants, keeping a large balance, which at the date of the agreements amounted to 6600*l*.

The plaintiff was sixty-seven years of age. William Bayley, one of his adult sons, had for many years been in business as a coal and coke merchant at West Bromwich

where he resided with his wife and seven children, and was assisted in his business by his brother James Bayley, who was also adult. William Bayley had for many years purchased large quantities of coal from the plaintiff, who had originally established him in business and had advanced and paid large sums on his account, and large sums had been due for some years on an account current for coal supplied; and at the time of the transactions impeached by this bill William Bayley owed and had owed for some time to the plaintiff about 3500*l.* for coal purchased, for moneys lent, and for rent. The plaintiff had for some years previously been in the habit of accepting payment from his son in his own bills or the bills of others received by him. Such bills were endorsed by the plaintiff to the defendants, and discounted by them, and the proceeds carried to the plaintiff's account. William Bayley also kept a separate account of his own with the defendants in respect of his own business, with which the plaintiff had nothing to do. He had been very irregular, and in 1862 the plaintiff had been compelled to sue him, since which time he had had little personal communication with him; but all matters of business were conducted through the plaintiff's clerk or solicitors.

At the request of William Bayley, the plaintiff, more than two years before the transactions hereinafter referred to, endorsed a bill of exchange or promissory note for the accommodation of William Bayley, whose father-in-law, Pitt, was originally a party to such bill, which was renewed many times. In January, 1863, the plaintiff received from the defendants notice of the dishonour of a bill or note of William Bayley, and, believing it to relate to the bill or note so endorsed, and having no notion of anything being wrong, the plaintiff directed Wilkes, his clerk, to forward the notice to William Bayley, which was done, and William Bayley promised to provide for it, and a few days after Mr. Deakin, the defendants' manager, informed the plaintiff

1864.
BAYLEY
v.
WILLIAMS.
—
Statement.

1864.
BAYLEY
v.
WILLIAMS.
—
Statement.

that William Bayley had taken up the bill, and the plaintiff made no further inquiry about it, and, except so far as it was referred to in the answer, was ignorant whether that bill was the one endorsed by him.

The bill stated that, except as to the one bill which he had so endorsed and the other bills received from William Bayley in payment for coal, the plaintiff never drew, endorsed, or accepted any bill or note, at the request or for the accommodation of his son, or to which he was a party. He once or twice received intimation that bills endorsed by him had been dishonoured, but he believed them to be some of the bills received from William Bayley, and they were always provided for without his being called upon to pay them. The bill alleged that, save as therein stated, the plaintiff never authorised or sanctioned the signature of his name to any bill of exchange or promissory note by William Bayley, and never knew until they told him that the defendants claimed to hold any bill or note drawn, endorsed, or accepted by him for the accommodation of William Bayley, or that his (plaintiff's) name had been forged.

The bill also stated that on the 17th April, 1863, as the plaintiff was getting into a train at Wednesbury, Mr. Deakin, the manager of the defendants' bank, came up and showed him a piece of paper folded up, with what purported to be the plaintiff's signature written upon it, and asked him if it was his signature, to which plaintiff replied that it was not. The train was on the point of starting, and there was no time for further explanation. Subsequently William Bayley came to the plaintiff and confessed that he had forged his name to a bill, which had been discounted by the defendants, and pressed the plaintiff not to admit or disown the signature, but to say that the bill should be taken up in a day or two. The plaintiff, however, refused. The next afternoon the plaintiff and another of his sons called on Mr. Deakin, who told them that William Bayley's liabilities to the bank upon bills or notes endorsed with

1864.
BAYLEY
v.
WILLIAMS.
—
Statement.

the plaintiff's name were serious, but if he would act properly, and his friends would back him, all might be kept right. The plaintiff stated that he had never given his name to any bill except one which had run out. Deakin then said that there were bills to the amount of between 6000*l.* and 7000*l.* bearing the plaintiff's endorsement. The plaintiff was astounded, and said that it was out of his power to save his son. The defendant Henry Williams then came into the bank, and appeared to be well aware of the facts, and stated that William Bayley ought not to absent himself, or his business and credit would suffer, and that he understood he had a great deal of property, enough to cover the liability, or nearly so, and all that was required was security. He added, "Well, it is one of those unfortunate affairs that are to be looked upon in a business light." A meeting was then arranged at the bank. The bill alleged that the defendants and Deakin well knew that the alleged endorsements were forgeries by William Bayley, and that the whole of the negotiations proceeded on that footing, nor did the defendants insist that the plaintiff was liable on the bills.

In pursuance of an appointment, the plaintiff, William Bayley, and his brother T. A. Bayley went to the defendants' bank, where they saw the defendant Philip Williams and Mr. Deakin. What took place on this occasion was stated in the eleventh paragraph of the bill, which was as follows :—

"A great number of promissory notes were produced, amounting, as the defendant Philip Williams stated, to about 6700*l.* The said Philip Williams asked the said William Bayley who wrote the plaintiff's name endorsed on the bills, and the said William Bayley replied that he had done so himself with his own hand, and the said defendant then made an observation in the following words, or to the following effect :—' The reason why I ask you is this, you might have employed some one to do it, and the person who did this might do more, and we should never

1864.
BAYLEY
v.
WILLIAMS.
—
Statement.

be safe.' And the said William Bayley then assured the said defendant that he had himself written the plaintiff's name, and the said defendant then asked the said William Bayley whether he knew the consequences, and used words to the following effect:—'Young man, do you know this is transportation?' And the said William Bayley replied as follows:—'If I am transported twenty times, I will not deny my handwriting.' Much discussion took place at the said meeting as to the state of affairs of the said William Bayley. A statement of his property was produced and carefully gone through and commented upon by the defendant Philip Williams, who said it showed him to be solvent, but on the plaintiff stating that the said William Bayley owed him more than 3000*l.* the said Philip Williams said, 'That makes him insolvent.' The plaintiff then offered to postpone his claim on William Bayley until the amount due to the defendants was paid, and the said William Bayley offered to give the defendants security on all he had. The said Philip Williams replied that William Bayley's friends must arrange it, and that the defendants could not meddle with his affairs, as it would be compounding felony. The defendant Philip Williams suggested that some one had better fetch William Bayley's wife and mother-in-law, Mrs. Woolley, to give information as to William Bayley's wife's interest in her father's property, and that the plaintiff should wait at Wednesbury until they arrived. The defendant Philip Williams then left, and the said William Bayley and Thomas Abishai Bayley fetched the wife and mother-in-law of the said William Bayley."

The plaintiff then went to the office of Mr. Duignan, and informed him of the result of the meeting, and requested him to accompany him to the bank. On their way they met Mr. H. Williams, who suggested that his solicitor, Mr. Thursfield, should accompany him to the bank. This was assented to, and the plaintiff's solicitor

requested Mr. Thursfield to attend. He and Mr. Duignan walked together to the bank, and during the walk Mr. Thursfield untruly said that the plaintiff had agreed to guarantee payment of the notes. On their reaching the bank Mr. Duignan told the plaintiff what Mr. Thursfield had just said, when the plaintiff at once repudiated any promise to guarantee the notes.

“ The plaintiff and his said solicitor and the said Thomas Abishai Bayley went into the bank parlour, and there met the said William Bayley and his wife Hannah Bayley. The said Francis Deakin, the defendant Henry Williams, and the said Mr. Thursfield shortly afterwards joined them there, and the plaintiff’s said solicitor at once stated that the plaintiff denied having agreed to guarantee the said bills or notes, and Mr. Thursfield said that the defendant Philip Williams quite understood he had done so. A statement of the property of the said William Bayley was produced, and the said Mr. Thursfield then examined the said William Bayley as to the state of his affairs and the amount of his liabilities, and a long discussion took place, and it was well understood by all the persons present, and was admitted and taken as the basis of the discussion and proposed arrangements, that the endorsements purporting to be made by the plaintiff upon the said bills or notes were all forgeries by the said William Bayley, and the total amount claimed on behalf of the defendants as due upon such bills was stated by the said Mr. Deakin to be about 6700*l*. At an early period during this discussion the said Mr. Thursfield said, ‘ It is a very serious matter for William Bayley,’ and the defendant Henry Williams made an observation to the same effect. The said Mr. Duignan said, ‘ Oh, it is a case of transportation for life. There is no doubt about that.’ The said reply was at once made by the said Mr. Duignan, by way of acquiescence in what he and the plaintiff then both well understood and believed was, and what the plaintiff believes and

1864.
BAYLEY
v.
WILLIAMS.
—
Statement.

1864.
BAYLEY
v.
WILLIAMS.
—
Statement.

charges in fact was, the meaning of the observation made by the said Mr. Thursfield. The defendants, by their answer, admit the observation to have been in fact made by the said Mr. Thursfield. From the position of the defendants, as magistrates, and of the said Mr. Thursfield, as their clerk, the meaning of the observation was clear, and was easily understood, and confirmed the plaintiff in the belief that unless the terms dictated by the defendants were agreed on they would institute criminal proceedings. And the plaintiff believed the defendants could and might at any moment act as magistrates, and that the said William Bayley might be forthwith arrested on the charge of forgery. The plaintiff stated that it was astonishing the said Francis Deakin should take such a number of notes or bills supposed to bear the plaintiff's endorsements without giving the plaintiff notice, or in any way communicating with him, as the defendants and the said Mr. Deakin well knew that the plaintiff never gave or signed bills of exchange or notes. The said Mr. Deakin intimated that the plaintiff was to blame, for he had given the plaintiff notice of the dishonour of one bill in January last, and had heard nothing from him; and the plaintiff then at once explained that he had endorsed a promissory note or bill for the said William Bayley, under the circumstances hereinbefore stated, and that the same has been renewed, but had long since expired, and that he believed the notice referred to that bill, and that he had delivered the notice to the said William Bayley, and had heard and thought no more of it, and that he had never endorsed, signed, or accepted any other bill or note for the said William Bayley."

Mr. Duignan strongly urged the plaintiff not to incur any liability, but suggested other arrangements, which, however, were not adopted.

"The defendant Henry Williams, and the said Mr. Thursfield, and the said Mr. Deakin thereupon left the

room to consult privately, and shortly afterwards the said Mr. Thursfield returned, and then, in a peremptory and decided manner, made the following observation, or used words to the following effect:—‘It is of no use beating about the bush. We expect Mr. James Bayley (meaning the plaintiff) to help his son out of the difficulty, and nothing else will do.’ The plaintiff’s solicitor said he would not permit the plaintiff to do more than he had offered, and the negotiations appeared to have closed, and the said Mr. Thursfield and Mr. Duignan conversed for a short time on some other subject. Mr. Duignan said, ‘Really, Mr. Thursfield, it’s too bad for you and I to be joking whilst Mr. Bayley is in such jeopardy.’ William Bayley said, ‘Oh, never mind me. I deserve to be transported.’ And the said Mr. Thursfield said to him, ‘Perhaps you may be yet.’ The wife of the said William Bayley, in great distress of mind, then interposed and pressed the plaintiff strongly to save her husband from transportation.

“The plaintiff then went to the defendant Henry Williams in the bank, and accompanied him into Mr. Deakin’s house, which communicates with the bank, and had an interview with the defendant Henry Williams alone. In the course of the discussion the said Henry Williams stated it would be a lamentable thing for William Bayley (with his seven children) to be transported, and that the amount could no doubt be realised out of his estate, and that if the plaintiff would guarantee it the matter might be kept secret, and they, the defendants, would do all they could to support him, the said William Bayley, but they would take nothing less than the plaintiff’s guarantee, and it must be that or transportation. The plaintiff was ultimately induced, under the pressure of the statements and circumstances aforesaid, and in order to save his son, the said William Bayley, from transportation, to agree to become security to the defendants for the amount which they claimed to be

1864.
BAYLEY
v.
WILLIAMS.
—
Statement.

1864.
BAYLEY
v.
WILLIAMS.
—
Statement.

due to them upon the said promissory notes upon which the plaintiff's name and endorsements had been forged by the said William Bayley; and it was understood and agreed by the defendants that, and the plaintiff understood and believed that, in consideration of his agreeing to give security, all the said promissory notes would be delivered up to him, as they in fact afterwards were, and that no criminal proceedings would be taken against the said William Bayley, and that he would be secured therefrom; and the plaintiff agreed to become security for the amount claimed by the defendants upon the said forged promissory notes solely upon this understanding and under this belief, to which he was led by the statements, conduct, acts, and proceedings of the defendants, or one of them, and of their said manager, Mr. Deakin; and but for this agreement and understanding, and the pressure aforesaid, the plaintiff would not have agreed to become or give security to the defendants.

“After the plaintiff had been induced to agree to the said arrangement the plaintiff's said solicitor, Mr. Duignan, was called into the room, and informed by the plaintiff of what he had agreed to do. The said Mr. Duignan strongly protested against any such arrangement, and in the presence of the defendant Henry Williams made observations to the plaintiff as follows:—‘Mr. Bayley, it's a very wrong thing for you to do.’ And the plaintiff, who was greatly agitated, and was in a state of mental distress and excitement, replied in the words or to the effect following:—‘What can I do? These men’ (meaning the defendants) ‘will have their money. My children can only strip me once, but if I don't do it it is transportation for William.’ The said Mr. Duignan protested in vain, and the said Mr. Duignan, finding that the pressure and influence brought to bear on the plaintiff rendered his interference useless, stated that he would take no part in the transaction, and would leave. The said Mr. Thursfield requested the

plaintiff's said solicitor to remain and see the arrangement carried out, but the said Mr. Duignan positively refused to have anything to do with the transaction, and immediately left. The said Mr. Thursfield and the defendant Henry Williams were present and heard the observations and remonstrances made by the plaintiff's solicitor.

1864.
BAYLEY
v.
WILLIAMS.
Statement.

"The plaintiff was at the time much agitated and affected, and became still more embarrassed in consequence of the departure of the said Mr. Duignan, and the plaintiff was induced to consent, and consented, to the terms dictated by the defendants and their solicitor, solely under the belief that the defendants would take criminal proceedings against the said William Bayley if he refused to comply. And the plaintiff charges, and it is the fact, that the defendants availed themselves of the position and mental distress of the plaintiff to obtain from the plaintiff an agreement to become security for the total amount of all the notes bearing the forged endorsements of the plaintiff's name, so far as the existence of such bills or notes was then communicated or known to the plaintiff.

"The said Mr. Thursfield, after the plaintiff's solicitor had as aforesaid left the said bank, then and there prepared an agreement, which the defendants required the plaintiff to sign, and the plaintiff accordingly then and there signed the same without any professional advice or assistance, and under the influence of the before-mentioned threat and pressure.

"The said agreement was as follows :—

'Wednesbury Bank,

'20th April, 1863.

'To Messrs. Philip and Henry Williams,

'Bankers, Wednesbury.

'In consideration of your consenting to give up to me the several under-mentioned bills and promissory notes, I

1864.
BAYLEY
v.
WILLIAMS.
—
Statement.

hereby charge all that my colliery situate at Tipton, in the County of Stafford, and known as the Tipton Meadow Colliery, with the engines, fixtures, and apparatus thereto belonging, and all other the hereditaments and premises described in the title deeds hereinafter mentioned, with the payment to you of 7203*l.* 14*s.* 6*d.*, being the amount advanced by you on the said bills and notes. And I hereby agree to pay to you the said sum of 7203*l.* 14*s.* 6*d.*, and I agree to deposit with you the several title deeds and writings relating to the said Tipton Meadow Colliery by way of equitable mortgage for securing payment to you of the said sum of 7203*l.* 14*s.* 6*d.*”

The plaintiff was required by Mr. Thursfield to bring his title deeds the next day, and on the 22nd April, 1863, he delivered the title deeds of the Tipton Meadow Colliery to Mr. Thursfield, and signed documents prepared by him, one of which was as follows:—

“ To Messrs. Philip and Henry Williams,
“ Bankers, Wednesbury.

“ In consideration of the sum of 7203*l.* 14*s.* 6*d.* already advanced by you upon certain promissory notes bearing my endorsement, and which promissory notes you have this day delivered up to me, and in consideration of your so delivering up the said notes, I, James Bayley, of Knowle, Warwickshire, Coalmaster and Farmer, hereby charge all that my colliery situate at Tipton, in the County of Stafford, adjoining the Golds Hill Ironworks of Messrs. Bagnall and Sons, the mines and works of Messrs. Haines and Underhill, and the mines and works of John Bagnall and Sons, and called the Tipton Meadow Colliery, and containing six and a half acres or thereabouts, and now in the occupation of Thomas Abishai Bayley, with the mines and minerals thereunder, and the buildings of every description, steam and other engines, machinery, fixtures,

and apparatus thereon, and the appurtenances thereto, and all the hereditaments and premises described and comprised in the title deeds and writings hereinafter mentioned, and all my estate and interest therein, with the payment to you of the said sum of 7203*l.* 14*s.* 6*d.*, with interest thereon from this day after the rate of 5*l.* per centum per annum, and which said sum of 7203*l.* 14*s.* 6*d.* and interest I agree to pay to you; and I now deposit with you the title deeds and writings mentioned in the schedule hereto by way of equitable mortgage of the hereditaments and premises comprised therein for securing payment to you of the said sum of 7203*l.* 14*s.* 6*d.* and interest, and I agree, upon request, at my expense to execute to you a legal mortgage of the hereditaments and premises hereby charged, with full powers for selling, leasing, and working the said colliery, and all other usual powers for securing payment to you of the moneys aforesaid.

“Dated the 22nd day of April, 1863.

“JAMES BAYLEY.”

At the foot of the document was the schedule of deeds. The other agreement also charged the property with 300*l.* alleged to be due on another forged note. On signing these documents Mr. Thursfield delivered to the plaintiff the twenty-four promissory notes mentioned in the schedule, and the additional note. On the following day, the plaintiff having had time to consider the effect of the transactions, consulted his solicitor, who immediately wrote to the defendants repudiating the transactions as improper. The defendants meanwhile refused to honour his cheque, though he had a balance in his favour of 6600*l.*, and shortly afterwards the plaintiff filed this bill. The defendants thereupon commenced an action in the Queen's Bench upon the agreement.

In the 20th paragraph of Mr. Duignan's affidavit he deposed as follows:—“The whole negotiation proceeded

1864.
BAYLEY
v.
WILLIAMS.
—
Statement.

1864.
BAYLEY
v.
WILLIAMS.
Statement.

upon the footing that the said notes were forgeries by the said William Bayley, for which he was liable to a criminal prosecution, and I had not the smallest conception or suspicion during the whole of the said interview that the defendants or Mr. Thursfield regarded the transaction in any other light."

Soon after the execution of the agreements William Bayley absconded.

The defendants, by their answer, alleged that in the action by the plaintiff against William Bayley the particulars of demand showed a balance of 4228*l.* 8*s.* 3*d.*, less 1220*l.* 1*s.* 3*d.*, of which sum about 600*l.* was due on three bills of exchange. In the 12th paragraph of the answer they alleged that a very large number of bills and notes to which the said William Bayley was a party, and which purported to have been endorsed or accepted by the plaintiff, passed through their bank. The answer then referred to notices which Mr. Deakin had sent to the plaintiff of his son's bills which bore the plaintiff's endorsement being dishonoured, alleging that as to some of them the plaintiff expressed great concern. The 35th paragraph of the answer was as follows:—

"Shortly after the interview which took place between the said Thomas Abishai Bayley and the said Mr. Francis Deakin, as hereinbefore mentioned, the said Mr. Francis Deakin went with the said Mr. Thursfield, our solicitor, to see this defendant, Henry Williams, and this defendant, Henry Williams, who had previously been informed by the said Mr. Bassett Smith of the first letter so as aforesaid written by the Birmingham Town and District Bank, and his own interview, hereinbefore mentioned, expressed the belief, which he in fact entertained, that the notes held by our bank, if not actually endorsed by the plaintiff himself, had been so endorsed with his consent and authority, and this last-named defendant asked the said Mr. Thursfield whether in such case they would be

forgeries, and the said Mr. Thursfield told him that they would not, and this defendant, Henry Williams, compared the endorsement of the plaintiff's name on some of the notes with the signature of the plaintiff to one of his cheques which had passed through our bank. And this defendant, Henry Williams, said, as in fact was his opinion, that he was not satisfied that such endorsements were not in the handwriting of the plaintiff. Having regard to this, it was arranged to wait till it was seen what steps the said William Bayley and his family took in the matter. At three o'clock in the afternoon of the same day the said Thomas Abishai Bayley came again to our bank, and then and there saw the said Mr. Francis Deakin. The said Thomas Abishai Bayley then promised to bring the plaintiff and the said William Bayley to the said Mr. Deakin's house that evening. In about an hour after the last-mentioned interview the said Thomas Abishai Bayley came to the said Mr. Francis Deakin's house and told the said Mr. Francis Deakin that his father (the plaintiff) was outside, and asked if he (the said Mr. Deakin) would see him, to which request the said Mr. Deakin consented. Thereupon the said Thomas Abishai Bayley brought the plaintiff into the said Mr. Deakin's house. The plaintiff on seeing the said Mr. Deakin expressed astonishment and asked whether there were any other bills besides the one he (the said Mr. Deakin) had shown him. The said Mr. Deakin had not at that time mentioned any others. The said Mr. Deakin replied, 'Yes, several.' The plaintiff thereupon asked impatiently, 'Can't you tell me the amount?' The said Mr. Deakin replied, 'About 5000*l.* or 6000*l.*' he thought. The plaintiff said, 'You make my hair stand on end. I know no more about it than this stick,' referring to a stick which he then held in his hand. The plaintiff then said that he was going, an old man and grey, and could not be expected to beggar himself, but that he was willing to do anything to assist

1864.
BAYLEY
v.
WILLIAMS.
—
Statement.

1864.
BAYLEY
 v.
 WILLIAMS.
 —
Statement.

in reason. The said Mr. Deakin said that Messieurs Williams (meaning us) did not wish to exercise any pressure upon him (the plaintiff) if it could be satisfactorily arranged. We were not nor was either of us present at the said meeting up to this time, but we have been informed by the said Mr. Francis Deakin and believe that the plaintiff did not then state that he had never given his name to any bill, except the bill which had run off some time before, or give or make any other explanation or statement to that or the like effect, but that he said that he knew nothing whatever about 'the bills,' without making any exception as to any particular bill."

The answer in several passages (42nd, 44th, & 45th paragraphs) denied that the defendants ever admitted that the endorsements were forgeries. In the 49th paragraph they alleged that at the meeting of the 20th April, 1863, the defendant P. Williams having remarked that, according to his statement, William Bayley was solvent, his brother J. A. Bayley said, "Oh, its a capital trade" (William Bayley's), and added it was too good a thing to give up. It was well worth 1000*l.* a year he was sure. He had gone through the books. The plaintiff then said, addressing William Bayley, "Now, William, don't deceive these gentlemen. You say you can pay them 1000*l.* a year?" W. Bayley replied, "Yes, father, I can." The defendant Philip Williams thereupon said, "We shall have nothing to do with any 1000*l.* a year. If the bills are are yours" (addressing the plaintiff) "we are all right. If they are not we have only one course to pursue. We cannot be parties to compounding a felony."

In the 57th & 58th paragraphs the defendants denied that Philip Williams asked William Bayley if he knew the consequences, or used the words, "Young man, do you know this is transportation?" or that he replied, "If I am transported twenty times I will not deny my handwriting."

In the 74th paragraph the defendants admitted that Mr. Thursfield did once say, "It is a serious matter," and that Mr. Duignan immediately said, "It is a case of transportation for life." But Mr. Thursfield had not said for whom or in what respect it was a serious matter, and no remark was made on Mr. Duignan's observation.

1864.
BAYLEY
v.
WILLIAMS.
Statement.

In the 86th paragraph they denied that the word "transportation" was ever used, or that they made any threats, and they alleged that they always believed, if the endorsements were not actually signed by the plaintiff, that he had authorised, or William Bayley believed he had authorised, his name being put on the bills.

In the 93rd paragraph they alleged that, "Except the observation of the defendant P. Williams at the interview, that 'If the bills were not James Bayley's, we had but one course to pursue,' and the observation of Mr. Duignan that 'It is a case of transportation for life,' nothing approaching an intimation of the possibility of criminal proceedings had been said to the plaintiff, and, with the view which we entertained of the matter, it was very probable that, if no arrangement had been come to at the last-mentioned interview, we should rather have sued the plaintiff at law on the notes than have taken criminal proceedings against the said William Bayley. At any rate, no design whatever of instituting criminal proceedings against William Bayley was ever formed by us. In fact the matter never reached a stage and point when it became necessary for us to intimate whether we would do so or not."

In the 102nd and 103rd paragraphs they admitted that the plaintiff signed the further agreement without separate advice or assistance, and denied that he required such advice or assistance. They admitted the second agreement had not been perused by any solicitor on his behalf.

In the 133rd paragraph they alleged that they honoured two cheques for 37*l.* and 40*l.* each, and in the 137th para-

1864.
BAYLEY
v.
WILLIAMS.
—
Statement.

graph explained that they refused to honour the cheque for 5000*l.*, because they thought it an unjustifiable thing for the plaintiff, without the least notice, to transfer his balance from the defendants' bank to another banker while the claims under the agreement remained unsatisfied.

The 142nd and 147th paragraphs of the answer, which raised the material defence to the bill, were as follows:—

“ We insist that the said agreements do not amount to and were not in fact an arrangement entered into by us for compounding a felony, and we make out the contrary by the statements herein contained. We understand that compounding a felony is ‘the taking of a reward for forbearing to prosecute an offence of that description.’ But we say that we never did anything of the sort. We never threatened to prosecute, or asserted that we intended to prosecute, or even determined to prosecute the said William Bayley. It never became necessary for us to determine, and we never determined, or even deliberated, whether we would do so, and we never forbore or agreed to forbear to do so, nor did we take any reward whatever for our alleged forbearance or agreement to forbear to do so. And on the execution of the said agreements we did not cancel the notes alleged to bear forged endorsements, but handed them to the plaintiff, leaving him to indict his son for forgery or to abstain from doing so as the plaintiff might think fit. And we further say that if we thought the said William Bayley had committed a felony, and we had any desire to prosecute him, we have entered into no promise, agreement, or engagement whatever to abstain from prosecuting the said William Bayley, but we submit whether, under the circumstances herein appearing, a felonious intention on the part of the said William Bayley existed, and whether he could be convicted of feloniously forging the plaintiff's endorsements on the said notes, though we insist that it is not material for our defence to this suit whether such be the case or not.

“ The plaintiff rests his case mainly on two grounds— first, that the transactions which led to the said agreements were equivalent to compounding a felony ; secondly, that he was induced by perforce to execute them. But we say, first, that if any felony was committed (which we do not admit, but which is, as we insist, immaterial as regards the question in this suit), we never compounded it, that is to say, we never forbore or agreed to forbear an intended prosecution for it, or even threatened or contemplated a prosecution ; and, secondly, we say that no perforce whatever was used against the plaintiff. He had the advice of his solicitor throughout the negotiations which led to his signing the said agreements. He willingly offered to enter into the agreements. He had plenty of opportunities for reflection and deliberation. In the first instance he brought the wrong title deeds, and might have refused to bring the right set of deeds if he had repented of his engagement. He first signed a document intended to lead to a formal agreement ; he then signed two formal agreements. It was he who requested that the second of such agreements should be prepared on the same footing as the first. He received the consideration by the delivery to him of the said notes, even if he did not sign the said notes with his own hand. The relation of father and son existed between him and the other party to such notes, and he acquiesced for some time in the existing state of things, and it was not until he found that his said son’s circumstances were hopelessly and irretrievably embarrassed that he conceived, or, at any rate, that he acted on the design of repudiating the said agreements, or insisting that they were invalid.”

The defendants relied on Mr. Duignan’s affidavit where he stated that the plaintiff said, “ If you and Mr. Duignan can put me right with the creditors, so that I can come in as a creditor for the account.”

1864.
BAYLEY
v.
WILLIAMS.
Statement.

Mr. Malins and Mr. F. W. E. Everitt for the plaintiff.—

Argument.

1864.
 BAYLEY
 v.
 WILLIAMS.
 —
Argument.

There were two grounds on which these agreements must be set aside by this Court—first, that the transaction out of which they arose was the compounding of a felony, and therefore void both at law and in this Court; and, secondly, that those agreements were executed by the plaintiff without having had the benefit of independent advice, and under pressure as great as could be exercised by one man over another. That where the consideration for an agreement was the doing of an illegal act the agreement was void at law was clear from the authorities. Thus, in *Sprye v. Porter*(a) a plea of maintenance to an action on an agreement was held good on demurrer. In *Collins v. Blantern*(b) an agreement to stifle a prosecution was held bad, and if there was any doubt on this point previously, this case settled the law: *Ex parte Critchley*(c), *Keir v. Leman*(d). In *Gilbert v. Sykes*(e), and *Evans v. Jones*(f), where the contract was in the form of a wager, it was held void.

Even if there had been a valid claim by the defendants on these bills they could not enforce it till they had discharged their public duty of prosecuting the delinquents [*Stone v. Marsh*(g), *Ex parte Elliott*(h)], or at least till the offender had been prosecuted: *Chowne v. Baylis*(i).

Claridge v. Hoare(j), *Waite v. Jones*(k), *Dyer v. Tymewell*(l), *Mare v. Sandford*(m), *Egerton v. Brownlow*(n), *Jackman v. Mitchell*(o), *Smith v. Cuff*(p), *Wallace v. Hardacre*(q), *Osbaldiston v. Simpson*(r), *Bosan-*

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| (a) 7 Ell. & Bl. 58. | (i) 31 Beav. 351. |
| (b) Smith, Leading Cas. vol. 1. | (j) 14 Ves. 59. |
| 318. | (k) 1 Bing. N. C. 636. |
| (c) 3 D. & L. 527. | (l) 2 Vern. 122. |
| (d) 6 Q. B. (N. S.) 308, affirmed | (m) 1 Giff. 288. |
| in error, 9 Q. B. (N. S.) 371. | (n) 4 H. of L. 1. |
| (e) 16 East, 150. | (o) 13 Ves. 581. |
| (f) 5 M. & W. 77. | (p) 6 Maule & S. 160. |
| (g) 6 B. & C. 551. | (q) 1 Campb. 45. |
| (h) 3 M. & Ayr. 110. | (r) 13 Sim. 513. |

quett v. Dashwood(a), *Reynel v. Sprye(b)*, and *Osborne v. Williams(c)* were cited on the question of illegal contracts.

But, secondly, on the mere ground of pressure these agreements were void: *Dent v. Bennett(d)*, *Chesterfield v. Janssen(e)*, *Heathcote v. Paignon(f)*. Inadequacy of consideration would imply pressure: *Underhill v. Horwood(g)*, *Wade v. Simeon(h)*.

It was submitted, therefore, on both grounds, that these agreements must be set aside.

Sir *H. Cairns*, Mr. *Karslake*, and Mr. *Kingdon* for the defendants.

The whole evidence in the case was inconsistent with the claim set up by this bill. The plaintiff's story was, to say the least of it, improbable. He was a shrewd man of business, but of imperfect education, and, as he himself said, left the counting-house business to others. What, therefore, was more probable under such circumstances than that he should authorise his son to use his name? But if he was in the habit of doing so, though not uniformly, he was liable on the notes: *Byles on Bills(i)*. But, whether he did or not, by the course he took of acquiescing in the claim made by the defendants after he had received notice of the dishonour of some of the bills he adopted his son's acts.

But supposing the plaintiff knew the endorsements were forgeries, unless the defendants knew it, which they positively denied, the transaction was not illegal. They believed they had a valid claim on the plaintiff, and consented to take security for it. That would not make it illegal.

1864.
BAYLEY
v.
WILLIAMS.
Argument.

(a) Cas. temp. Talbot, 38.

(b) 1 De G. M. & G. 660.

(c) 18 Ves. 379.

(d) 4 M. & C. 269.

(e) 2 Ves. sen. 124.

(f) 2 B. C. C. 166.

(g) 10 Ves. 209.

(h) 2 C. B. 342 (M. G. & Scott).

(i) Pages 29, 30, 8th ed.

1864.
 BAYLEY
 v.
 WILLIAMS.
 —
 Argument.

The plaintiff had an obvious motive in doing what he did. The son's business was said to be valuable, and the father, who had against him a claim for upwards of 3000*l.*, would have lost his whole debt unless the son were saved from ruin. In this state of things he volunteered to take the son's debt upon himself, as he alleged, but, as the defendants contended, he consented to give security for the debt of himself and his son. Then where was the illegality? Where was the pressure? The cases cited as to the forgery had obviously no application. As the defendants were ignorant that a crime had been committed, it was impossible for them to compound a felony. But even if they knew it, the agreement was not void unless they had contracted not to prosecute: *Ward v. Lloyd* (a). A transfer of property made on the eve of bankruptcy, but under the apprehension that a degree of force, civil or criminal, is about to be applied, is valid: *De Tastet v. Carroll* (b). In order to vitiate these agreements there must have been a distinct contract to stifle a prosecution: *Wallace v. Hardacre* (c), *Wickham v. Gatrill* (d).

As to the alleged want of consideration, the delivery up of the notes was sufficient to support the agreement: *Haigh v. Brooks* (e).

On these grounds it was submitted that the bill must be dismissed with costs.

[*Ex parte De Tastet* (f) was also cited].

Mr. *Malins* was part heard in reply, but was stopped by his Honour.

The VICE-CHANCELLOR:—

Judgment.

This suit is instituted to set aside two agreements, dated the 20th and 22nd April, 1863, on the ground that they

(a) 6 M. & G. 785.

(b) 2 Rose, 462; 1 Starkie, 88.

(c) 1 Campb. 45.

(d) 2 S. & G. 353.

(e) 10 Ad. & El. 323.

(f) Mont. 138.

were executed by the plaintiff in a transaction which amounted to compounding a felony committed by the plaintiff's son.

If the fair result of the evidence shows that the agreements were executed under influence felt by the plaintiff and exercised by the defendants, if the fear of the criminal prosecution against the plaintiff's son, or if the result of the discovery of a criminal act, for which the plaintiff was not liable, was used by the defendants against the plaintiff to operate upon his fears, so as to induce him to give a security which would relieve his son from a criminal prosecution, according to the law of this Court a security obtained under such circumstances cannot stand. The inequality in the situation of the parties, the one exacting a security which the other is driven to give in order to save his son from exposure, disgrace, and ruin, taints the security obtained under the influence of such fears.

If the main and influencing purpose was the relief of the son from the consequences of his crime, if this was the main consideration operating on the father's mind, and was the origin and real cause of the transaction, the intervention of other circumstances, or other collateral advantages to the father, will not be enough to justify the Court in upholding such a security.

The only question, therefore, in this case seems to be, whether the defendants took advantage of the plaintiff's situation.

The origin of the negotiations which ended in the agreements was the discovery that the plaintiff's name had been forged by his son on promissory notes of which the defendants were holders to a large amount. There is nothing in the evidence on either side to show that the plaintiff was liable to pay the notes, or that the defendants were negotiating with him on the footing of his being under any legal liability to them.

In the 93rd paragraph of the defendants answer they

1864.
BAYLEY
v.
WILLIAMS.
Judgment.

1864.
 BAYLEY
 v.
 WILLIAMS.
 Judgment.

say, "No design whatever of instituting criminal proceedings against the said William Bayley was ever formed by us." But they add this remarkable statement, that "In fact, the matter never reached a stage and point when it became necessary for us to intimate whether we would do so or not."

In paragraph 74 they say that Mr. Thursfield, the solicitor, did once, in the course of the discussion, say, "It is a serious matter," and that Mr. Duignan (the plaintiff's solicitor) immediately said, "It is a case of transportation for life." These significant words are followed by this insignificant explanation, that "Mr. Thursfield had not said for whom or in what respect it was a serious matter, and no remark was made upon the succeeding observation of the said Mr. Duignan, viz., that it was a case of transportation for life."

In paragraph 35 of the answer the defendants say, "The said Mr. Deakin (the manager of the defendants' bank) said that Messrs. Williams (meaning us) did not wish to exercise any pressure upon him (the plaintiff) if it could be satisfactorily arranged."

It is a material circumstance that Mr. Duignan, when he found the plaintiff disposed to enter into the agreement and to assume the liability, in order to relieve his son, remonstrated strongly, and, finally, positively refusing to sanction such a transaction, retired altogether, and left the plaintiff in the hands of the defendants and their solicitor, who then procured the plaintiff to execute the agreement of the 20th April. Nor is it unimportant that this first agreement of the 20th April, according to what appears to be the truth of the case, contains nothing like an acknowledgment of any legal liability of the plaintiff. The second agreement, which is dated the 22nd April, 1863, also signed by the plaintiff in the absence of his solicitor, is so framed as to make the plaintiff recognise the forged signature as genuine, for it recites that the notes were endorsed

by the plaintiff, a recital now admitted to be untrue, and contrary to the truth as understood by the parties at that time.

The result of the evidence on both sides is given in the 20th paragraph of Mr. Duignan's affidavit, where he says, "The whole negotiation aforesaid proceeded upon the footing that the said notes were forgeries by the said William Bayley, for which he was liable to a criminal prosecution, and I had not the slightest conception or suspicion during the whole of the interview aforesaid that the defendants or Mr. Thursfield regarded the transaction in any other light."

It is unnecessary to consider whether the offence of compounding a felony was committed or not. It is not the province of this Court to decide whether crimes or misdemeanours have been committed. If it were necessary to decide the question, there would be great difficulty in holding that an agreement not to prosecute is not to be implied.

The real question is, whether there was that degree of equality between the parties to these agreements which is necessary to make them valid. Where a man is driven to comply with terms which were exacted by operating on his fears, and by the power which the other parties make him see they have acquired of prosecuting, exposing, and disgracing his son, there is an inequality and a want of that freedom of action which is necessary to the validity of an agreement. Where a power of operating on a man's fears exists, and he enters into a contract unwillingly and under the influence of that power, its existence constitutes pressure. The assent which is necessary to the validity of an agreement must be an assent uninfluenced by any power of operating upon his fears of punishment, or of disgrace which may be inflicted on the dearest object of his natural affection at the instance of the person to whose power he yields. The argument founded on the

1864.
BAYLEY
v.
WILLIAMS.
Judgment.

1864.
BAYLEY
v.
WILLIAMS.
Judgment.

allegation that the plaintiff had connived at the use of his name by his son it not justified by the evidence in the suit.

But even if the fact were proved, it seems to have no material bearing on the question as to the validity of the agreements, and was not in any way an ingredient or actuating motive in the negotiation. The evidence shows that the greater part of the facts relied on as to this part of the case were discovered by the defendants long after the transaction, and do not seem to be of very material bearing on the real question before the Court.

For the defendants an attempt has been made to show that the plaintiff's object was to gain a pecuniary benefit to himself by getting the entire dominion over his son's assets, so as to secure payment of a pre-existing debt to himself. That view of the transaction is contradicted by the evidence of what passed between the parties. The defendants' counsel have relied on a passage in Mr. Duignan's affidavit, where he states that the plaintiff said, "If you and Mr. Duignan can put me right with the creditors, so that I can come in as a creditor for the amount." But the antecedent and subsequent conversation of the parties, as described in the same paragraph, annihilates the argument; for the witness says that on his remonstrating with the plaintiff against his giving the proposed security the plaintiff replied, "What can I do? These men will have their money, and if I don't guarantee it, it's transportation." There must be a decree declaring the invalidity of the two agreements and ordering that they be delivered up to be cancelled, that the plaintiff's title deeds be delivered to him, and that the promissory notes be delivered back to the defendants.

There must also be a direction discharging the order of July, 1863, and that the costs of that order and of the motion for the injunction be costs in the cause, and that the defendants pay to the plaintiff the costs of the suit.

CASES IN CHANCERY.

255

NOTE.—The case of *ex parte De Tastet*, Montagu's Reports, is remarkable for the difference of opinion between Lord Eldon and Sir James Mansfield on the one hand, and Lord Ellenborough and Lord Brougham on the other, but on examination it appears that the general doctrine as stated by Lord Eldon remains unshaken. The opinions of Lord Ellenborough and Lord Brougham were founded on the narrow ground that a transfer of property on the eve of bankruptcy to one creditor, to the prejudice of the other creditor, unless it be voluntary, is valid. This would be true if the only pressure were the threat of an action or execution for debt in a civil action. In that case Lord Eldon intimated his opinion that the question had never been properly tried in the Court of King's Bench, if that Court were of opinion that any pressure, that is to say, a pressure through a threat of a criminal prosecution, was sufficient to enable a party to hold property obtained under it.

The decision of Lord Brougham in that case seems to apply only to the meaning of the word "voluntary" in considering the effect of the bankruptcy law. But, even in that view, and with reference to the bankruptcy law, the general equitable doctrine as to the effect

of pressure through threat of a criminal prosecution would now be held to taint the transaction, and to make it invalid upon a principle of great public importance. And upon the weight of authority the opinions of Lord Eldon and Sir James Mansfield would probably prevail. In Pothier's Treatise on Contracts, in the article of want of liberty, the main proposition is that the consent by which agreements are formed ought to be free.

Sir William David Evans, in his valuable translation of Pothier (in a note, vol. 1, page 18), has given this sensible criticism of the doctrine of the civil law, "If a person actually contracted under the impression of fear induced by the misconduct of another, though by means in general inadequate to such an effect, it should be a sufficient ground to vitiate the contract; and the infirmity of one man's mind should not be taken advantage of for the purpose of conferring a benefit on another, whether the other was or was not implicated in the misconduct, though the age, constitution, and occupation of the party might furnish very material evidence in deciding upon the fact, and such I think it is probable would be the decision of the English law."

NOTE.
—
RAYNER
A
WILLIAMS
—
Judgments

HEATH v. LEWIS.

EX PARTE JOHNSON.

1864.

Nov. 11th.

ON the death of her father, in 1845, Sarah Emily, the present petitioner, became entitled under her grandfather's will to a sum of about 1300*l.* cash and stock.

In 1851 she married one Charles Johnson; there was no settlement entered into on her marriage, and, by an order dated the 9th July, 1856, and made in the suit to administer the grandfather's will, the fund was carried to the separate account of Charles Johnson and Sarah Emily his wife, subject to legacy duty. By a deed, dated the 15th of May, 1857, to which the wife was no party, the husband mortgaged the fund to Richard Scale, who obtained a stop order on it on the 25th of June, 1857. It was alleged that the wife had authorised his doing so by power of attorney, but this she denied. At the date of this transaction the wife was resident abroad, but on the 15th June, 1858, being still abroad, she presented her petition to this Court, stating that her husband had been living away from her for a considerable time, and had not during that period contributed to her support, but had received large sums of money belonging to her which he had applied to his own use; that he had recently become insolvent; and that his estate was now vested in the provisional assignee of the Court for the Relief of Insolvent Debtors. The petition thereupon prayed that the fund might be settled upon herself for life with remainder to her children.

A fund in court not reduced into possession, accruing in right of the wife, on whose marriage no settlement was made, and who was divorced by a Colonial Court at the suit of the husband, declared to belong to the wife as against a mortgagee of her husband, and also as against her children claiming a settlement.

The husband also presented a petition in the name of himself and wife praying for payment to him of one moiety of the fund, and that the other might be settled. Both petitions came on for hearing on the 19th July, 1858.

1864.
HEATH
v.
LEWIS.
Ex parte
JOHNSON.

—
Statement.

The Court, upon the hearing of the two petitions, dismissed that of the husband, and upon the wife's petition made an order that, the Court being of opinion that the petitioner was entitled to have a settlement of the whole or some part of the fund, the income of the fund should be paid to the petitioner for her separate use until further order, and that the consideration of the rest of the petition should be adjourned, with liberty to any party to apply as to the question of what settlement ought to be made. No further application was in fact made, and the fund now remained in court, subject to the above order.

The husband shortly afterwards instituted proceedings in the Colonial Court of the Cape of Good Hope against the petitioner, alleging that during his absence in England she had committed adultery, and praying for a divorce. On the 15th November, 1859, he obtained a decree from the Circuit Court held in Port Elizabeth, without costs, dissolving the marriage. There were three children of the marriage, of which the two elder were ordered to be delivered to the husband. The husband has since married again. The wife now presented her petition praying that of the sums of stock and cash in court amounting in present value to about 1300*l.*, and which, by virtue of an order dated the 9th of July, 1856, made in the suit for the administration of the estate of the testator in the cause, had been carried to "the separate account of Charles Johnson and Sarah Emily Johnson, subject to legacy duty," the stock might be sold, and that the proceeds thereof and the cash might be paid to the petitioner.

The petition was served on the husband and on his assignee in insolvency, and also on his mortgagee, and now came on to be heard.

—
Argument.

Mr. *Greene* and Mr. *Caldecot*, for the petitioner.—It is not pretended that the husband ever reduced this fund

into possession during the coverture, and the law is quite clear that if so it remains the property of the wife.

Mr. *Freeling*, for the mortgagee.—The husband, who has married again and cannot dispute the validity of the divorce, must admit that he was during the time of the coverture domiciled at the Cape of Good Hope, for otherwise the divorce would be a nullity, and he would be entitled in his marital right. But if so the rights of the parties must be governed by the law of the colony, which authorises the assignment by a husband of his wife's personal estate: *Rex v. Lolley (a)*.

Mr. *Osborne*, for the assignee, contended that during the coverture the husband had endeavoured to settle the fund: he therefore claimed one moiety of the fund for the husband's creditors, and submitted that the other ought to be settled.

The VICE-CHANCELLOR:—

It is beyond a doubt that this fund is the property of the lady who is the petitioner, and that unless there be any marital rights remaining in her former husband she would be clearly entitled to it. The Court seems to have considered in July, 1858, that, as against him and in derogation of his marital rights, she had an equity to a settlement; but by an order made in that year the Court gave leave to those interested to apply for a settlement. No order for a settlement was made, and no order was made either taking away the husband's rights existing at that time or positively giving the property to the wife; but there was simply leave given to the parties to apply for a settlement. It appears that at the Cape of Good Hope a decree was obtained by the husband, being a

1864.
HEATH
v.
LEWIS.
Ex parte
JOHNSON.
—
Argument.

Judgment.
—

(a) Russ. & Ryan, 237.

1864.
 HEATH
 v.
 LEWIS.
Ex parte
 JOHNSON.
 —
Judgment.

resident in the colony, for a divorce from the petitioner. The Colonial Court upon the evidence dissolved the bond of marriage. The petition of the divorced wife is opposed by the mortgagee of the husband, and a question about the validity of the divorce is raised on the ground of the domicile of the parties, but without a tittle of evidence. Questions of domicile, and as to the rights of husband and wife, are often of the greatest difficulty. In this case there seems no just ground for raising them.

I cannot but assume that the Colonial Court was the proper jurisdiction to dissolve the marriage, and that everything was done properly. The judicial proceedings seem to have been properly taken and the decree properly pronounced. As to the question whether or not I am to consider the former husband of this lady as her husband still possessed of a marital right—either with her consent to take the whole of this fund, or without her consent subject only to her right to so much as this Court would settle upon her—I can see no ground for entertaining it. *Lolley's case* has been referred to, but that was a case in which questions of domicile were raised upon conflicting evidence. In the present case there is no evidence whatever to impeach those judicial proceedings. The husband himself does not come forward to assert any claim, but his mortgagee and his assignee in insolvency have done so, as it appears to me, upon grounds which cannot be maintained in argument.

The evidence of the petitioner proves that she is a single woman, and if that be so a mortgagee of her interest in a chose in action not reduced into possession during the coverture cannot interfere with her right.

The question as to the right of the children is peculiar, inasmuch as the Court, in 1858, thought the petitioner had a right to the fund, and gave leave to apply upon the subject of a settlement. If a settlement had been made the children would no doubt have had some provision made

for them by it. But in the absence of a settlement or a decree for a settlement I know of nothing which can enable the children to claim a settlement of this fund. The children are not in this country, and it is said that they are under the care of their father, which is in law the proper care, for the law casts upon the father the duty of maintaining them. I am not aware of any case in which, where a wife does not ask for a settlement, her children have been held entitled to come and ask for one.

The Court has never compelled a wife to settle her property as against her own right to it, but it asserts a right to settle her property as a protection against her husband. I never heard of a question being raised as between the mother and her children. An order has been obtained to serve them with a copy of the petition, but that was a mistake. The order was applied for under a misapprehension, and I am glad it will not be acted upon. I wish the counsel for this petitioner to understand that, although the children are maintained by their father, they are her children also. I have no power to compel her to settle the fund, and all I can do is to remind her that the children are still her own. The order will be to transfer the whole of the fund in court to the petitioner, and that the costs of all parties appearing on the petition be paid out of the fund.

1864.
 HEATH
 v.
 LEWIS.
Ex parte
 JOHNSON.
 Judgment.

1865.

*March 22, 23,
24, 25, 27, 28.**May 3.*RHODES *v.* BATE.

Where the professional adviser of the plaintiff, being aware of her pecuniary means, and of the influence over her possessed by her brother-in-law, who was indebted to him, took securities from the plaintiff for the amount of his debt, the Court set them aside, and made the defendant pay the costs of the suit.

THIS bill was filed by Sophia Rhodes against Mr. Robert Bate, her professional adviser, the Rev. Henry Codrington, for whose debts she had been rendered liable, and Francis and William Brice, who claimed to be interested in the property belonging to the plaintiff.

The bill alleged that the plaintiff in 1848 went to reside with the defendant Codrington, who is her brother-in-law, and continued to reside with him till May, 1863. That the plaintiff received from the trustees of her father's will, in 1853, 800*l.* in cash; in 1854, 1200*l.* more; and the balance, amounting to 3880*l.*, was with her sanction invested on a mortgage of leaseholds at Islington transferred to her. The plaintiff, shortly after receiving the sums of 200*l.*, 600*l.*, and 1200*l.*, lent them to the defendant Codrington at his urgent request, and with the privity of Bate, to be invested by Codrington in land which Bate induced Codrington to purchase. Codrington promised to give to plaintiff good security for the said sums, amounting to 2000*l.*, but omitted to do so, and those sums were lost. The defendant Bate, in October, 1857, knew that such sums were lost, and that the sum of 3880*l.* represented her whole fortune. The bill alleged that the plaintiff first employed Robert Bate as her professional adviser in December, 1853, when she was desirous of altering her will, and he by that means became fully acquainted with the amount of her fortune, and, from the knowledge acquired by him in the course of such investigation of her accounts, conceived the design of diverting the plaintiff's fortune from her, and applying the same towards payment of Codrington's debts to himself. The bill also alleged that, in consequence of the hostile manner in which the trustees' accounts were examined

by Bate, an estrangement took place between the plaintiff and her brother, one of the trustees, so that no communication passed between her and him at the close of 1862.

The bill then alleged that in 1851 Codrington, at the suggestion and under the advice of Bate, commenced a system of speculating in the purchase and sale of land, and continued speculating till 1861; and that Bate acted in the matter of the purchase of mortgages and sales of land made by Codrington, and entered the particulars of such transactions in ledgers and account-books kept by him; and that such particulars formed part of a correct account kept by Bate against Codrington in the ledger, of which there was no copy given to the plaintiff or to Codrington till July, 1861. The bill charged that it was in July, 1861, that Bate first constructed the account.

The bill then set forth several purchases by Codrington, and subsequent mortgages to secure the purchase-money, the result of which was to leave certain sums due to Bate. The bill then stated one transaction in which, Codrington having accepted a bill of exchange dated the 5th of August, 1854, and that bill being dishonoured, the plaintiff was induced by Codrington to accompany him to Bate's office, where, without inquiry what she had to sign, she signed some printed form of bond which Bate filled up and produced to the plaintiff for her signature, and which proved to be a joint and several bond of the plaintiff and Codrington in a penal sum of 643*l.* to secure 321*l.* 10*s.* The bill alleged that the plaintiff was wholly unconversant with business in 1854, and wholly under the influence of Codrington, and the defendant Bate ought to have advised her not to execute the bond, or to have explained the effect thereof, but that he did neither. The bill also alleged that only 221*l.* 10*s.* was due, and not 321*l.* 10*s.*, and that such fact was in 1857 admitted by Bate.

1865.
RHODES
v.
BATE.

Statement.

1865.
RHODES
v.
BATE.
—
Statement.

The bill as amended then traversed an allegation of the defendant Bate that he had ever lent her any money or paid the same for her use, or that on the 31st of March, 1855, Codrington and plaintiff, as his surety, ever accepted a bill of exchange of that date drawn on them by Bate at three months for 525*l.* by way of securing part of the balance of 1033*l.* 0*s.* 4*d.* The Bill alleged that no consideration was ever given to the plaintiff for accepting the said bill of exchange, and the plaintiff charged that if she ever did accept it, which she did not remember, she did so under the pressure of the defendants Bate and Codrington, and that she did not know that the effect of joining was to make her personally liable to pay 525*l.*, and the plaintiff charged that had she known it she would not have signed such bill, and that Bate ought to have advised her not to sign the same. The bill then referred to several liabilities she had incurred, *i. e.* a covenant in a mortgage deed of the 30th of April, 1855, a bond for 250*l.* as collateral security, which the plaintiff alleged that, if she executed it at all, she did so under pressure, and that Bate ought to have advised her not to execute. The bill also charged that Bate did not lend her the two sums of 20*l.* and 80*l.* which he averred he had lent. On the 15th of October, 1857, a balance was struck between Bate and Codrington, on which it appeared that 2089*l.* 3*s.* 4*d.* was due to Bate from Codrington. On the same day Codrington requested plaintiff to accompany her to Bate's office, and when there told her in Bate's hearing that her signature was required as a matter of form, but that nothing would ever come of it. Bate made no observation, and the plaintiff therefore believed that she was in truth about to sign some formal document which would not in any way affect her. Both Bate and Codrington, however, procured the plaintiff to sign and deliver to Bate the following bill of exchange and promissory note:—

“£1259 : 17 : 8

Bridgewater, 15th Oct., 1857.

1865.

RHODES
v.
BATE.

Statement.

Three months after date pay to my order the sum
of £1259 : 17 : 8.

Value received.

To the Rev. Henry Codrington
and
Miss Sophia Rhodes, Wembon.”

*Accepted payable at
the Sealy
Bank of Messrs.
& Co., Bridgewater.
HENRY CODRINGTON.
SOPHIA RHODES.*

ROBERT BATE.

“£800

We jointly and severally promise to pay to Robert Bate,
of Bridgewater, gentleman, or his order, the sum of £800,
with interest for the same, at the rate of £5 per cent. per
annum, value received, this 15th day of Oct., 1857.

HENRY CODRINGTON.
SOPHIA RHODES.”

At the same time and place Bate, in the presence of
Codrington, produced to plaintiff for her signature, and
Bate induced her to sign, the following agreement:—

“Whereas I the undersigned, Sophia Rhodes, am now
jointly indebted with the Rev. J. C. Codrington to
R. Bate, of Bridgewater, gentleman, in the sum of 321*l.*
10*s.* secured by bonds; 800*l.* secured by a promissory
note; and 1259*l.* 17*s.* 8*d.* secured by an acceptance; and
I am also indebted to Messrs. Sealy in the sum of 862*l.*
18*s.* 5*d.*, or thereabouts, and to William Turner, yeoman,
and George Richard Turner as surety for the said H.
Codrington, in several sums of money: Now, therefore,
for better securing the repayment of all and singular the
several sums of money for which I have become surety
for the said Henry Codrington as aforesaid, I have this
day deposited with the said Robert Bate, on behalf of
himself and the said several other parties, a certain in-

1865.
 RHODES
 v.
 BATE.
 —
Statement.

denture of mortgage of premises at Islington from J. and W. Clements and others to me, for securing 3880*l.*, and the title deeds relating to the said premises; and I hereby declare that the said mortgage and the title deeds shall be held by the said Robert Bate as a security for him, and to the said several other parties, and shall not be redeemed or redeemable by me until all money due jointly from the said Henry Codrington and myself shall be fully paid and satisfied. And I hereby undertake and agree, at any time hereafter, at the request of the said Robert Bate and at my costs, to execute a transfer of the said mortgage to him and the several other parties aforesaid, for securing the payment of the sums of money so jointly due from the said Henry Codrington and myself.

“ Witness my hand, this 15th day of October, 1857,

“ SOPHIA RHODES.

“ Witness, WILLIAM PLOWMAN.”

The defendant Bate thereupon took possession of the plaintiff's mortgage, which, on the 11th of January, 1862, was transferred to the defendant Francis Brice. The bill did not impeach the said transfer, or the conduct of Francis Brice, so far as concerned Francis Brice; but it alleged that the defendant William Brice, who acted for Francis Brice, was privy to the transaction which was effected by Bate and Codrington.

The plaintiff denied that she was liable to Messrs. Sealy, but alleged that if she ever joined in notes to these gentlemen she did so under pressure, and was not liable in equity.

It appeared by the evidence that the plaintiff was liable to Messrs. Sealy in the sum of 862*l.* 18*s.* 5*d.* On the 24th April, 1860, Robert Bate and Henry Codrington told her it was necessary for her to sign the following document, which she accordingly did:—

"Whereas the several sums of 321*l.* 10*s.*, 800*l.*, and 1259*l.* 17*s.* 8*d.*, in the annexed memorandum of deposit mentioned to be due and owing to Robert Bate from Sophia Rhodes and H. Codrington, are still due and owing to him, but all interest has been paid, as Robert Bate hereby admits: And whereas Robert Bate, at the request of S. Rhodes and H. Codrington, hath this day paid Messrs. Sealy 862*l.* 18*s.* 5*d.* mentioned in the annexed paper to be due from them, with interest and costs, amounting to 973*l.* 3*s.* 1*d.*: And whereas S. Rhodes and H. Codrington have this day made and given their joint and several promissory notes of even date to the said R. Bate to secure 1488*l.* 5*s.*, being amount paid to Sealy, and 515*l.* 1*s.* 11*d.*, this day lent by Bate to Codrington with interest, and Sophia Rhodes hath agreed to charge the sum 3880*l.* due to her from Messrs. Clements on mortgage of hereditaments in Islington, the mortgage and title deeds of which are now in Bate's custody, with payment of the said three several sums of 321*l.* 10*s.*, 800*l.*, and 1259*l.* 17*s.* 8*d.*, so due as aforesaid, as of 1488*l.* 5*s.* this day lent and secured by the said note, with interest, and she doth declare that, the said sum of 3880*l.*, nor her estate and interest in the premises, shall be redeemed or redeemable until full payment, as well of the said sum of 1488*l.* 5*s.* now advanced, with lawful interest, as of the said several sums of 321*l.* 10*s.*, 800*l.*, and 1259*l.* 17*s.* 8*d.*, and the interest thereof respectively.

"Witness my hand this 24th day of April, 1860.

"SOPHIA RHODES."

1865.
RHODES
v.
BATE.
—
Statement.

The bill alleged that no valuable consideration was ever given to the plaintiff for joining in the said note. That the plaintiff never asked Bate to pay Messrs. Sealy. That Robert Bate never asked her for any authority to prepare the said agreement, and she never gave it. That Codrington never told her for what purpose she was re-

1865.
RHODES
v.
BATE.
—
Statement.

quested to go to Bate's office, and that neither he nor Bate ever explained that the effect would be to make her liable to pay the amount secured thereby. The bill charged that it was the duty of Bate to have informed her of the effect thereof, and that it ought to be declared that the said agreement is not binding on the plaintiff.

The bill alleged that in the account in Bate's ledger against Codrington was the sum of 4637*l.* 7*s.* 1*d.*, for which he claimed to hold security from the plaintiff for 3769*l.* 12*s.* 8*d.* Under these circumstances the bill charged that Bate, in collusion with the defendants William Brice and Codrington, contrived the plan which Bate afterwards carried into effect by obtaining payment to himself of the sum of 3880*l.*, secured by the mortgage on the Islington property, and of paying himself out of her fortune. The bill then set out the circumstances of the transfer of the mortgage to Francis Brice, and alleged that under coercion and misrepresentation the plaintiff allowed William Brice to pay to Bate, instead of to herself, the sum of 3856*l.* 12*s.* 2*d.*, part of the said sum of 3880*l.*; Robert Bate caused to be paid to her the sum of 23*l.* 7*s.* 10*d.*

The plaintiff, on the 1st of July, 1863, filed this bill praying that it might be declared that the instruments of the 8th of November, 1854; the 15th of October, 1857; and the 24th of April, 1860, were improperly obtained from and were not binding on the plaintiff.

Secondly: That it might be declared that Bate obtained the said sum of 3856*l.* 12*s.* 2*d.* by coercion, undue influence, and misrepresentation, and might be decreed to repay the same to the plaintiff with interest at 5*l.* per cent..

Thirdly: That if necessary an account might be taken of the sums of money (if any) lent by Bate to the plaintiff, and that, less what he should be found to have advanced,

he might be decreed to repay to the plaintiff the balance of the said 385*l.* 12*s.* 2*d.* with interest.*

Fourthly: That William and Francis Brice might be ordered to deliver up to be cancelled the two documents of the 15th of October, 1857, and the 24th of April, 1860; and that the bond, bill of exchange, and promissory notes might be amended by striking out the plaintiff's name; and that it might be declared that the covenant for repayment of the 3880*l.* was obtained from the plaintiff without consideration, and was not binding on her; and, if necessary, for an injunction.

The defendant by his answer admitted generally that he had acted at times for the plaintiff, but denied that he was her regular professional adviser; he denied also the use of any undue influence, and alleged that the plaintiff was a shrewd woman who understood business matters thoroughly.

A great part of the evidence was on the question whether Bate had been the professional adviser of the plaintiff, and also on the question of the competency of the plaintiff.

Mr. *Rolt*, Mr. *Greene*, and Mr. *W. W. Karlake*, for the plaintiff, contended that the evidence clearly proved that the defendant Bate acted as the professional adviser, and, that relation being established, the influence was an inference of law, and, if so, the transaction could not stand: *Gibson v. Jeyes (a)*, *Morgan v. Higgins (b)*, *Davis v. Parry (c)*.

Secondly: they contended that Bate, through her brother-in-law, had made use of undue influence, and on that ground also the transaction could not be supported: *Anderson v. Elsworth (d)*, *Huguenin v. Bazely (e)*, *Norton*

1865.
RHODES
v.
BATE.
—
Statement.

Argument.
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(a) 6 Ves. 266.

(b) 1 Giff. 270.

(c) *Ibid.* 174.

(d) 3 Giff. 154.

(e) 14 Ves. 273.

1865.
RHODES
v.
BATE.

Argument.

v. *Relly* (a), *Hoghton v. Hoghton* (b), *Baker v. Bradley* (c),
Dent v. Bennett (d), *Maitland v. Irving* (e), *Archer v.*
Hudson (f).

The issues of fact raised by the bill were in the Vice-Chancellor's opinion clearly proved by the evidence.

Mr. *Bacon* and Mr. *Freeling*, for the defendant *Bate*, contended that the evidence clearly showed that *Bate* was never the plaintiff's professional adviser, except in the matter of her will and in investigating her accounts. The professional relation, if it could be called such, had long terminated when the transactions complained of occurred. The cases as charged in the bill and established by the evidence were different. Looked at in its true light, the case was one of suretyship, but the liability of a surety could not be got rid of by alleging that the principal debtor exercised undue influence over the surety: *Hunter v. Atkins* (g), *Oldham v. Hand* (h).

The plaintiff to entitle herself to relief must make out either fraud or undue influence on the part of the person against whom she sought relief, and that proposition of law was in effect admitted by the bill, but the evidence fell short of the allegations: *Blackie v. Clark* (i), *Waters v. Taylor* (k), *Blagrove v. Routh* (l), *Welles v. Middleton* (m).

It was submitted, therefore, that the bill must be dismissed with costs.

Mr. *Malins* and Mr. *Bickley Rogers*, for the defendant

- (a) 2 Eden. 286.
- (b) 15 Beav. 278.
- (c) 7 De G. M. & G. 597.
- (d) 7 Sim. 539.
- (e) 15 Sim. 437.
- (f) 7 Beav. 551.

- (g) 3 M. & K. 113.
- (h) 2 Ves. sen. 259.
- (i) 15 Beav. 595.
- (k) 2 M. & Cr. 526.
- (l) 2 K. & J. 509.
- (m) 4 B. P. C. 245.

Brice, submitted that no case had been made out against them, and the bill must therefore be dismissed with costs.

1866.
RHODES
v.
BATE.

Mr. *Rolt* replied.

Argument.

The VICE-CHANCELLOR reserved his judgment.

The VICE-CHANCELLOR:—

May 3rd.
Judgment.

The result of the transaction mentioned in the pleadings and evidence in this cause is that the whole of the plaintiff's property, except a balance of a little more than 20*l.*, has passed into the hands of the defendant Mr. Bate in payment of debts due to him by the defendant Codrington, without any benefit or any valuable consideration whatever accruing to the plaintiff.

During the whole of the transactions the plaintiff was residing and had been for several years residing in the family, and as a member of the family, of the defendant Codrington, who was married to her sister. She was much attached to him, and to her sister, and to their children. All the transactions which are impeached by her in this suit took place after she was fifty years of age, as it appears she was born in the year 1803. That the defendant Codrington had very great influence over her, and used that influence to his own advantage, is beyond doubt.

As to the defendant Bate, he was the professional adviser and friend of Codrington. One material question in the case, as a question of fact, is whether the defendant Bate had so acted as the plaintiff's professional adviser as to stand in that relation of confidence towards her, producing influence over her which can bring the case within the doctrine of this Court which invalidates acts of bounty unless there be clear evidence of circumstances sufficient to show protection against undue influence.

It can scarcely be said that the right of the plaintiff to relief against Bate depends upon proof that he was the

1865.
RHODES
v.
BATE.
—
Judgment.

confidential legal adviser, and stood in a position which gave him great influence over her.

There is little reason to doubt, upon the result of the evidence, that, whether Bate was her confidential legal adviser or not, he was well aware of the influence which the defendant Codrington had over her. He certainly had ascertained the amount of her fortune, and it cannot be doubted that he gave credit to Codrington in the confidence that the influence of one or both of them would induce her to become surety for Codrington. Indeed, on the occasion of the last transaction Mr. Bate says that before she executed the deed on the 24th of April, 1860, he warned her that from the state of Codrington's affairs it was quite clear that he would not be able to repay her.

Lord Eldon said in *Huguenin v. Bazely* (a) that he should regret if any doubt could be entertained that it is not competent to a Court of Equity to take away from third parties the benefits which they have derived from the undue influence of others.

But the evidence in this case proves that on various occasions the plaintiff employed Mr. Bate as her professional adviser. On this point, however, there are some denials in the answer of Mr. Bate very express and positive. He denies that she employed him to alter her will in December, 1853. In the eleventh paragraph of his second answer he says, "I deny that I was in the month of November, 1855, the plaintiff's professional adviser; and I do not know and I cannot set forth as to my information, belief, or otherwise, who was her professional adviser."

As to his having been consulted by the plaintiff in December, 1853, as to her will, an occasion on which she showed the will she had previously made, the evidence of the plaintiff's sister, and of the plaintiff herself, is too cir-

(a) 14 Ves. 278.

cumstantial and clear to be disregarded, Mr. Bate admits that he was employed to make her will in 1855. And as to his having acted as her professional adviser during the year 1855, the letters and the bills of costs of Mr. Stephens, who acted as his London agent (on Mr. Bate's recommendation and with Mr. Bate's assistance), besides the other documentary evidence on this part of the case, are conclusive, and the more so because Mr. Stephens has not been brought forward to say anything in contradiction or explanation of the purport of the documents.

It was on the 24th of April, 1860, that the ultimate security which in fact exhausted the plaintiff's property was given to Mr. Bate. The account which he himself gives in the 37th and 38th paragraphs of his first answer of this transaction, and his description of the explanation and monition which he then gave her, show how much in his own opinion she required protection and assistance against the influence under which she was then acting.

No distinction can be made as to that part of the debt to Bate which was incurred by his paying off the debt to Sealy. It is true that Mr. Bate does not seem to have had any hand in the original voluntary obligation of the plaintiff to Sealy for that sum, but he was no stranger to the influence under which it had been given, and he was himself the actor in the transaction of October, 1857, and prepared the memorandum of deposit by which the plaintiff's property was pledged to himself to secure the debt due to Sealy as well as the debt due to himself.

Upon a fair consideration of the evidence it seems plain that the defendant Bate took advantage of the influence which the defendant Codrington and he himself had over the plaintiff. There must, therefore, be a decree against both these defendants to make good to the plaintiff all her property which the defendant Bate thus acquired.

As to the defendant Frederick Brice, he and the other defendant, William Brice, have been made parties to this

1865.
RHODES.
v.
BATE.
—
Judgment.

1865.
RHODES
v.
BATE.
—
Judgment.

suit in consequence of the objection taken by the defendant William Bate.

They are no doubt properly made parties. The costs of the defendant Austin Brice must be paid in the first instance by the plaintiff, and the amount must be added to the costs which the defendants Bate and Codrington must be decreed to pay to the plaintiff. It has been attempted to make a distinction as to the costs of the defendant William Brice. He certainly acted as the solicitor of the plaintiff in the transaction of the transfer of the securities, but he was in no way involved in the creation of the obligations which deprived the plaintiff of her property.

The transfer put Mr. Bate in possession of the money, and Mr. William Brice is properly a party to this suit in the character of a trustee in that transaction.

On these grounds the costs of William Brice ought, I think, to be provided for in the same way as the costs of the defendant Austin Brice, and be ultimately paid by the defendants Bate and Codrington.

1864.

MACKINTOSH v. THE GREAT WESTERN
RAILWAY COMPANY.

June & July.
Feb. 1864
& June, 1865.

This bill was filed in 1847 by the original plaintiff, David Mackintosh, contractor, against the Great Western Railway Company; Mr. Saunders, their secretary; and Mr. Brunel, their engineer. The case has been repeatedly before the court (a) and several of the parties to the original suit are dead; the suit has been subsequently revived against their representatives so far as it was necessary.

The original plaintiff, David Mackintosh, had entered into seven principal and other subordinate contracts for the construction of the railway works near Slough and part of the line between Bristol and Bath, and claimed over and above what had been paid large sums as due on the contract. On the 30th May, 1855, the Court referred it to chambers to enquire and certify whether anything and what remained due to the plaintiff in respect of the works executed and materials supplied under the several contracts in the pleadings mentioned, having regard to the terms of the contract respectively, and to the circumstances under which the plaintiff carried on the works.

In pursuance of the direction the chief clerk made his certificate, by which he found a gross sum due to the plaintiff, but, the company being dissatisfied with the decision on the ground that the items were not specified, appealed to his Honour, who approved the certificate.

(a) 2 De G. & Sm. 758; 2 M. & G. 174; 14 De G. & Sm. 544; 3 Sm. & G. 146.

of money is payable at a time certain, and upon a sum to be ascertained on certain data, but a dispute occurs as to the amount which is settled by the Court interest is payable under the Statute 3 & 4 Will. 4, c. 42.

Where, on the investigation of a complicated demand for work and labour done and other matters, or performance of work under a contract with a railway company for works of enormous extent, the chief clerk's certificate, after a laborious examination, ascertained the amount, the Court will not allow the amount ascertained to be varied as to the whole or any part of it, unless a case of clear mistake or manifest abuse is shown. In such cases the certificate should not be varied on any ground which would not be a ground for moving for a new trial, or setting aside the verdict of a jury.

When by a contract a sum

1864.
 MACKINTOSH
 v.
 THE GREAT
 WESTERN
 RAILWAY
 COMPANY.
 Statement.

The company appealed against this decision, and the Lords Justices allowed the appeal and directed the chief clerk to amend the certificate by stating the details. The chief clerk, in pursuance of the order, certified that a sum of nearly 200,000*l.* was due from the company. To this the defendants moved to vary this certificate as to more than 900 items. The plaintiff also moved to vary the certificate, objecting to the disallowance of certain sums for ashlar work, and other matters amounting to upwards of 100,000*l.*

The case also came on for further consideration. The chief clerk had allowed interest at 4 per cent. This question, and that of the costs of the suit, were also raised.

Argument.

The *Attorney-General* and Mr. *F. J. Millar* appeared for the plaintiffs:—

They supported the certificate, but further submitted that if the defendants' exceptions were allowed the plaintiff's counter-exceptions must be allowed also, though otherwise the plaintiff would be contented to take the certificate.

On the subject of interest they cited—*Davis v. Smyth* (a), *Fare v. Ward* (b), *Mildmay v. Methuen* (c), *Ashwell v. Staunton* (d), *Swynfen v. Scawen* (e), *Lowndes v. Colless* (f), *Upton v. Lord Ferrers* (g), *Marshall v. Poole* (h), *Lucas v. Temple* (i), *Fenton v. Crickett* (k), *Shewell v. Jones* (l), *Re Catlin* (m), *Alsop v. Lord Oxford* (n).

As to interest on a building contract they cited—*Hyde v.*

(a) 8 M. & W. 399.

(b) 3 M. & W. 25.

(c) 3 Drew. 91.

(d) 30 Beav. 52.

(e) 1 Ves. Sen. 99.

(f) 17 Ves. 27.

(g) 5 Ves. 800.

(h) 13 East, 98.

(i) 9 Ves. 300.

(k) 3 Mad. 496.

(l) 2 Sim. & St. 170; 3 Russ. 522.

(m) 18 Beav. 508.

(n) 1 M. & K. 564.

Price (a); 3 & 4 Wm. 4, c. 42, s. 28. They also claimed the costs, on the ground that the defendants had been guilty of vexatious conduct in delaying the settlement of the plaintiff's claim.

1864.
MACKINTOSH
v.
THE GREAT
WESTERN
RAILWAY
COMPANY.
Argument.

Mr. *Bacon*, Mr. *Malins*, and Mr. *T. Stevens* appeared for the company.

They submitted, first, that the Court had no jurisdiction to entertain the suit. They cited *Parker v. Hutchinson (b)*, *Young v. Walter (c)*.

Secondly, they contended that the decision of the chief clerk could at most be regarded as the award of an arbitrator, who was bound to decide according to the rule of law.

Thirdly, on the question of interest, they contended, first, that, there being no decree for interest, the Court had no power to give it: *Creuze v. Hunter (d)*. And, secondly, that, there being no agreement to pay interest, and the money not being payable on a day certain, no interest could be given: *Higgings v. Sargent (e)*, *Hare v. Richards (f)*, *Bushnan v. Morgan (g)*, *Foster v. Weston (h)*, *Rhodes v. Rhodes (i)*, *Tew v. Lord Winterton (k)*, *Calton v. Bragg (l)*, *Gordon v. Swan (m)*, *Cameron v. Smith (n)*.

And, lastly, on the question of interest, they contended that the plaintiff, having claimed excessive prices, ought not to be allowed interest: *Duchess of Marlborough v. Strong (o)*.

On the question of costs they contended that the plain-

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| (a) 8 Sim. 578; s. c. 6 L. J. 358. | (h) 6 Bing. 709. |
| (b) 3 Ves. 133. | (i) Johnson, 653. |
| (c) 9 Ves. 364. | (k) 1 Ves. 451. |
| (d) 2 Ves. 157. | (l) 15 East, 223. |
| (e) 2 B. & C. 348. | (m) 12 East, 419. |
| (f) 7 Bing. 254. | (n) 2 B. & Ald. 305. |
| (g) 5 Sim. 635. | (o) 1 B. P. C. 175. |

1865.
 MACKINTOSH
 v.
 THE GREAT
 WESTERN
 RAILWAY
 COMPANY.

June 28.

Judgment.

tiff, by having claimed enormous sums beyond what was allowed, had, in fact, occasioned the litigation, and ought to pay the costs of the suit, or, at all events, ought not to be allowed costs.

THE VICE-CHANCELLOR:—

There is now before the Court a motion by the defendants to vary the chief clerk's certificate as to more than 900 items. Each of these items has been the subject of argument.

The evidence on which all this must be disposed of, and the arguments upon that evidence, have been separately considered, and this Court has now for the fourth time to deal with them.

If it had appeared at the hearing of the cause that the Court could have disposed of the case without further investigation, the proper decree on the frame of the bill would have been for the payment by the defendants to the plaintiff of one single gross sum due to him for the construction of the works.

In matters of account there is a concurrent jurisdiction at law and in equity. But this being a suit by a contractor to recover the amount due for work and labour and materials supplied, and not a bill for an account properly so called, the defendants have disputed the jurisdiction of this court. No doubt the nature of the investigation and of the evidence would differ much from what is usual in a decree for an account.

The authorities, however, show that this Court has entertained such cases; and Lord Cottenham, in the case of *The North-Eastern Railway Company v. Martin (a)*, held that where circumstances seemed to make it convenient this Court ought to exercise the jurisdiction.

Whether the remedy be at law or in equity, the proper

course must be to determine by a proper investigation the reasonableness of the plaintiff's demands. Neither in this Court nor at law can it be the proper course to have a separate adjudication on each item separately considered. The course is, to investigate each item with reference to other items, and on a consideration of all the circumstances bearing on each, with reference to the whole, to fix the total sum which ought fairly to be allowed. If this Court, assuming a jurisdiction in a case which according to the usual course would be dealt with in a court of law, does not mould its proceedings so as to make them in a due degree conformable to those of the more proper and ordinary jurisdiction, the result will probably be inconvenient and mischievous.

The chief clerk in the certificate before the Court has stated the result of an elaborate investigation, and has also, in compliance with the wish expressed by the Court of Appeal, stated details of the particulars of demand which have enabled the defendants to bring before the Court a motion to vary the certificate as to more than 900 items. The amount of one item as to which the defendants have raised a dispute (No. 12 of 6 B.) is the sum of threepence. As to another the sum in dispute is ninepence. There are fifty-three items each under 1*l.*, and 145 items under 5*l.*

No such proceeding could be allowed before a court of law or an arbitrator, and the intolerable amount of expense and delay which it would produce is the reason why it is not allowed. In this court, where the jurisdiction to settle the amount due for work and labour and materials supplied is ordinarily exercised in the taxation of a solicitor's bill, when on the investigation before the taxing master he has decided as to an item the Court does not permit an application to vary his decision as to particular items, although it will sometimes permit an appeal against his decision as to a class of items to the whole of

1865.
 MACKINTOSH
 v.
 THE GREAT
 WESTERN
 RAILWAY
 COMPANY.
 Judgment.

1865.
 MACKINTOSH
 v.
 THE GREAT
 WESTERN
 RAILWAY
 COMPANY,
 Judgment.

which one principle may apply. It was so settled by Lord Eldon in *Lucas v. Temple* (a). In the case of receivers' accounts the Court in like manner refuses applications to vary as to items. (See *Fenton v. Cricket* (b); *Shewel v. Jones* (c); *Re Catlin* (d); *Alsop v. Lord Oxford* (e). Where the Court referred accounts to an arbitrator and directed accounts to be taken in like manner as before a master, and the arbitrator made his award without setting forth the items but stated the general result, exceptions on the ground that he had not stated the particular balances, or how the general balance was arrived at, were overruled; and the Court said "it would be of mischievous consequence if, wherever the Court sends complicated accounts to arbitrators, they should set out all the particulars. It is much better that the award should be made in the short way it is." This was in a case of account properly so called: *Dick v. Milligan* (f).

A case of *Smith v. Smith* (g) was mentioned in the Court of Appeal, but it seems to have no application whatever to questions of this kind. It was a case under the old practice, now fortunately abolished, in which the Court condemned the report of the Master because it merely referred to the accounts as filed in his office and did not set them forth. It appeared that copies of the accounts were necessary to make the report intelligible, and that the reason for not setting them forth was the disgraceful and corrupt purpose, that the parties should pay fees to the Master's clerk for obtaining copies.

It is important to observe that the Act of 15 & 16 Vict. c. 80, s. 69, has now regulated the form of the chief clerk's certificates, and has enabled the parties to obtain, during the progress of any inquiry or account, the opinion of the

(a) 9 Ves. 300.
 (b) 3 Madd. 496.
 (c) 2 S. & St. 170; S. C., 3
 Rus. 522.

(d) 18 Beav. 508.
 (e) 1 M. & K. 564.
 (f) 4 B. C. C. 117.
 (g) Dick. 789.

judge upon any particular point or matter arising in the course of the investigation.

The items which have been disputed on the present motion for the most part involve questions of compensation and of estimate on the *quantum meruit*, on which probably no two men would agree. Even one man, although a competent judge, might at different times arrive at different results, according to the force with which particular circumstances might strike his mind; and yet it might not be easy to say that either of the different conclusions was wrong.

It is for this reason that the law refers such questions to a jury. The sum which the whole jury agrees to fix as a proper, although it may be a sum on which, perhaps, no two of the jurymen, each acting separately on the dictates of his own understanding, would have fixed, yet, being agreed to by the jury on a compromise of opinion, is accepted as conclusive. Any other principle must lead to an extent of vexatious litigation, perhaps interminable. After having heard the defendant's counsel for twenty-three days in support of the motion to vary the certificate upon each of the prodigious number of items, which have been erroneously treated by them as insulated decisions, I think the result is this—that upon no one of them has a case been made out which would be considered a sufficient ground for ordering a new trial at law. It is not enough to show that it is doubtful whether the decision embodied in the certificate, treating that decision as a verdict, is certainly correct, or is perfectly satisfactory, or that some other amount would, in the opinion of the Court, be more proper. None of these are sufficient grounds for disturbing the finding of a jury, nor is there any authority for saying that all or any of these grounds would be sufficient to justify the Court in finding on the certificate. In the case of *Carstairs v. Stein* (a) a new trial was moved

1865.

MACKINTOSH

v.

THE GREAT
WESTERN
RAILWAY
COMPANY.

Judgment.

(a) 4 M. & Sel. 192, 200.

1865.

MACKINTOSH

v.

THE GREAT
WESTERN
RAILWAY
COMPANY.*Judgment.*

for, and, although the Court thought the jury might have come to a more satisfactory conclusion, yet it refused to direct a new trial or disturb the verdict. Lord Ellenborough said, "The Court, in granting new trials, does not interfere unless to amend some manifest abuse, or to correct some manifest error in law or in fact."

This principle rests on the plain necessity of accepting as final the first decision on a fair investigation, where the nature of the question is such that, if there must be a new investigation and new decision by a succession of appeals, each decision might be for a different amount, and the decision of the last resort, differing from all the others, would have against it the presumption of error from the number of previous contrary decisions. The result would be to deprive the decision on final appeal of that authority which an ultimate decision should carry.

It is to prevent such inconvenient consequences that questions of this peculiar kind, when once fairly investigated and decided, are not usually allowed to be opened again, or the decision to be disturbed, except on the strong ground of manifest error or manifest abuse; and never on the ground that a different result might be more satisfactory to the mind of another tribunal.

If I had yielded to the impression produced as to some of the items on an insulated view, very sufficient reasons might be given for varying the certificate; but it would be a fallacious mode, and to my mind an unjustifiable mode, in a case of this kind, to deal with the separate items by a final adjudication upon each, without a view to the general bearing of the allowance of each item by reference to other items and to the whole ultimate amount, and to all the circumstances of conduct, and to the general purport of each contract, and to all these provisos which as to many of them are of difficult construction.

If I am wrong in this view, the correction of it will, I hope, extract some luminous exposition of the principles

on which such cases should be treated in this Court; but, unless at least the same amount of labour is bestowed upon this case as has been bestowed upon it already during the five years of careful examination of the evidence, and correspondence, and the pleadings in my chambers, and the full discussion recorded in the enormous mass of shorthand-writers' notes of the proceedings on which the chief clerk's certificate is founded, the variation of the certificate would, to my mind, be not only an unsatisfactory thing, but a thing unjustifiable.

1865.
 MACKINTOSH
 v.
 THE GREAT
 WESTERN
 RAILWAY
 COMPANY.
Judgment.

To illustrate these views, it may be proper to refer to one or two of the questions argued during the twenty-three days occupied by the labours of the defendants' counsel. One item as to which they asked to vary the certificate is No. 31 in the contract 3 D, where 20*l.* is stated as a proper sum to be allowed for four gates. The defendants insist that only 14*l.* should be allowed, that is, at the rate of 3*l.* 10*s.* for each gate, instead of 5*l.* each. On what evidence is the sum of 14*l.* ascertained? On nothing but an affidavit by Mr. Brunel, who says that he considers 3*l.* 10*s.* for each gate enough: he does not say that he ever examined the gates. The plaintiff's evidence goes to prove that 5*l.* is the proper charge. I know no safe ground on which the decision of the chief clerk on such a point as this is to be disturbed. Other items are of a more extraordinary nature, and show still more strongly the wisdom of the rule that the decision of such questions, once arrived at after a fair investigation, ought not to be disturb, because of mere difference of opinion on a matter of estimate and compensation, where the perfect accordance of any two persons as to exact amount can scarcely be expected. The item No. 141 of 3 B Extension Contract, is an allowance for compensation for great expense and delay occasioned to the contractor by the occurrence of an extraordinary circumstance. It appears that, while he was pressing forward his operations in per-

1865.
MACKINTOSH
v.
THE GREAT
WESTERN
RAILWAY
COMPANY.

Judgment.

formance of his contract, the remains of a Roman villa were discovered. Upon this discovery the engineers of the defendants, in order to preserve this interesting and valuable object, ordered the operations to be stayed, and fences to be constructed. All this was necessarily and obviously the cause of loss and expense to the contractor.

Upon this item three counsel for the defendants have argued in support of the motion to vary the certificate, insisting that there was no evidence before the chief clerk to justify the amount allowed. The argument was supported by reading irrelevant passages from the evidence, and some passages from the shorthand-writer's notes of the proceedings before the chief clerk. But, on referring to the chief clerk's notes, and referring also to the full record of what took place before him, it appears that the matter underwent, as all the other items did, a long and laborious investigation before him. Plans, letters, documents, and books were examined before him, and discussed on both sides. It clearly appeared from these, as it appeared to me on the discussion of the motion, that there was sufficient evidence that a heavy loss had been occasioned to the contractor, in respect of which justice required that he should have a fair compensation. Many modes of estimating that compensation might be suggested, and many objections might be stated to any mode of estimating it. It is highly probable that if, without any previous investigation or decision, the matter had come before the Court for the first time on this motion, a different amount, and perhaps a different mode of estimate, might have been arrived at. But where the Court is called upon to review and alter the amount once fairly fixed on a fair and full investigation, there is no safe ground for an alteration unless some manifest error or miscarriage can be shown.

It is enough to say, as to the whole of the defendants' 900 objections, that it seems to me to be the duty of the

Court to deal with them all on the same principle. No manifest error appearing, no miscarriage, and no abuse, the nature of the question is such that the decision once fairly arrived at should not be disturbed. If as to all or any of the items a *prima facie* case of manifest error or abuse had appeared it would have been the duty of the Court to examine the record of what took place before the chief clerk. It could scarcely be justifiable to vary the result found by the chief clerk without an investigation as full and as accurate as that which took place before him, not only as to the one particular item, but (inasmuch as, in such a case, the allowance or disallowance of most of the items has been by reference to the circumstances influencing the allowance or disallowance of others) from the bearing which each has upon the others, and upon the general result of the whole investigation.

1865.
 MACKINTOSH
 v.
 THE GREAT
 WESTERN
 RAILWAY
 COMPANY.
 Judgment.

The enormous bulk of the shorthand-writers' notes of the proceedings before the chief clerk, and before myself in chambers, would not have deterred the Court from this investigation if the necessity for it had occurred. One of the judges of the Court of Appeal has already mentioned the danger in this case of taking any short cut, and therefore a shorter examination and discussion than that which has taken place in my chambers during the five years would be improper and illusive. But I can see no ground for exposing the parties to the oppressive expenditure and delay of such a course of proceeding, even if the litigation had not lasted for nearly twenty years. I know no authority for the administration of justice on such a scheme, and I decline to entertain it.

There are, however, two points which have been put in the foreground by the defendants on this motion to vary the certificate, which deserve particular attention.

The first is as to a sum of 19,882*l.*, said to have been improperly allowed on the contract, 3 B Extension, for the Tiverton tunnel.

1865.

MACKINTOSH

v.
THE GREAT
WESTERN
RAILWAY
COMPANY.

Judgment.

The other is as to the contract 6 B, whether the sum is 17,000*l* or 16,500*l*.

The questions on these two matters are of a different kind from those which arise on the other items, and the observations already made as to the danger of disturbing the amount once awarded by a competent authority for compensation or damages, or remuneration, are not applicable.

But at the hearing of the cause these two points, which are both raised on the pleadings, and on both of which much evidence was given, was fully discussed. They might have been disposed of by the decree, but there seemed to me good reason for thinking that the investigation which the whole case must receive in chambers might produce something to throw more light upon both points, and therefore they were both left open. On referring to my notes of what took place at the hearing of the cause, and looking at the evidence then before the Court, if it had been necessary to decide at that time, I should have felt bound to decide them both in favour of the plaintiff.

What has taken place in chambers, and the result of the argument on the motion to vary the certificate, confirmed that view. The notes of the chief clerk are very clear as to the ground on which he proceeded. Now, after the third argument upon them it seems to me unnecessary to say more than this:—As to the first point, the evidence shows that the tender No. 2 contains the terms of the real contract; and that the tenders 2 and 3 must be read together. If the contractor received the gross sum of 35,419*l*. it could make no difference to him what sum was apportioned for the tunnel, but, if the tender No. 3 is taken alone, it has no schedule of prices applicable to the tunnel at all. Moreover, Mr. Brunel, in the 20th paragraph of his affidavit, says he has an impression that he said he would recommend the company to allow 35,419*l*. 19*s*.

As to the other point, there was no tender for 6 B for

any other sum than 17,600*l.* Mr. Brunel gave the tender for the sum of 17,600*l.* to the solicitor of the company as the proper amount.

There is no reasonable evidence that any mistake whatever was made in inserting the sum of 17,600*l.* in the body of the deed and annexing the tender.

1865.
MACKINTOSH
v.
THE GREAT
WESTERN
RAILWAY
COMPANY.
Judgment.

During the whole period of the construction of the works, and up to the institution of this suit, no other sum than 17,600*l.* was mentioned. But during the preparation of the defendants' answer an ingenious agent found the sum of 16,500*l.* mentioned in a paper made out in order to satisfy Mr. Brunel as to some details, and not made with any view whatever of altering the tender or the contract: the controversy was raised by the answer, and this paper was intended to be evidence that in the deed deliberately prepared and executed from the instructions from Mr. Bunnell there is a mistake as to this sum.

On the question of penalties claimed by the defendants the case has not been very strongly pressed at the bar.

The contract as to penalties was that they should be deducted from the amount of the certificates. But this never was attempted, except in two instances. The object of the stipulation as to penalties being to induce the rapid completion of the works, the proper course would be to deduct them from the certificates during the progress of the works. But, if not exacted during the progress according to the contract, the claim cannot easily be sustained when it is withheld until long after the completion of the works, and after the company has been in the full and profitable enjoyment of the labours of the contractor.

Some stress was laid on the circumstance that errors in the casting-up of the sums mentioned in the certificate have been discovered on the second investigation before the chief clerk. It is well known to every one conversant with accounts and calculations that such errors are

1865.
MACKINTOSH
v.
THE GREAT
WESTERN
RAILWAY
COMPANY.
Judgment.

unavoidable when there is such a number of items. It is possible that some such errors may still be detected; during the hearing of this motion more than one other error of that kind has been discovered. On questions of damage or remuneration the possible existence of such mistakes seems to me no sufficient reason for protracting an investigation in a case where absolute certainty of an exact and proper amount is impossible.

There has been before the Court on this occasion not only the motion of the defendants to vary the certificate, but also a motion by the plaintiff, who complains of the disallowance of items to an amount altogether exceeding 100,000*l*.

As to these, the Attorney-General, on behalf of the plaintiff, has taken what seems a wise and discreet course. The plaintiff considers that he has been hardly used as to these disallowances, but he has authorised his counsel to state that, being worn out with the delays and expenses of a litigation which seems endless, and finding that the Court sees no ground for diminishing the amount which the chief clerk has certified to be due, he prefers taking now what he can get, rather than continue the contest, and therefore submits to have this motion refused without prejudice to his right to go into it on appeal in case the defendants shall seek to disturb the order and decree now to be made.

The motions to vary the certificate being thus disposed of, it is proper to determine the questions which arise on the further consideration of the cause.

There is, therefore, the important question of interest to be decided. It became a question at the original hearing whether the decree should contain any direction as to interest. The bill prayed that interest might be allowed.

Again, it became a question during the inquiry in chambers whether, as the decree was silent on the subject,

the question of interest should be dealt with in chambers or should be reserved for the decision of the Court at the hearing on the further consideration.

As the decree directed an inquiry which would require a very long and laborious investigation of the particulars of the plaintiff's demand, it was thought the more proper course not to fetter the proceedings in chambers by any express direction as to interest, but to leave the question open. But on the investigation of the plaintiff's demand in chambers there were obvious reasons for entering into the question of interest, and dealing with it on the certificate; and I directed the chief clerk to deal with it. If it had been omitted in the certificate, and left for further consideration, it would probably have been contended that the delay and other circumstances relied on in support of the claim of interest had not been taken into consideration in chambers in stating the amount due to the plaintiff.

On the other hand, if the certificate dealt with the question, and it should be thought more proper for further consideration, no harm could be done by the certificate including it, as the argument could conveniently proceed on a motion to vary the certificate in that respect, and the court would see that the allowances to the plaintiff's claim had been made without reference to the question of interest.

The case of *The Duchess of Marlborough v. Strong* (a) is an authority of some importance. It seems to recognise the doctrine that in cases of this kind, which are cases of compensation, and not of account properly so called, where the scale of compensation is fixed at an increased rate, or what would seem an excessive rate in respect of what is called *slow payment*, interest should not be allowed; but that the slow payment must be compensated for in

1865.
MACKINTOSH
v.
THE GREAT
WESTERN
RAILWAY
COMPANY.
Judgment.

(a) 4 B. P. C. 539.

1865.
MACKINTOSH
v.
THE GREAT
WESTERN
RAILWAY
COMPANY.

Judgment.

one way or another, either by allowing interest on the fair amount if there had been prompt payment, or by an increased allowance in respect of the delay. As to the general doctrine of this Court it is well stated in *Tew v. Lord Winterton* (a) that interest may be allowed in cases where the nature of the transactions and the course of dealing or other circumstances are such that not a clear and absolute contract, but a species of contract, for the payment of interest, may be inferred. The doctrine at law has been stated by Lord Ellenborough, in *Calton v. Bragg* (b), in somewhat similar terms. As to the statute of 3 & 4 Will. 4, c. 42, the construction put upon it in the case of *Mildmay v. Methuen* (c), has not been shaken by any of the arguments for the defendants.

It cannot be said that in this case the time of payment was not certain, and if the certificates granted by the defendants had been for the proper sums the sum would have been certain too. When a dispute arises as to the sum payable at a certain time, and the proper amount ought according to the contract to have been ascertained at the time which was certain, the result of the litigation being to settle the amount which was certainly due at the time, certain interest is payable.

As to the rate of interest, my impression is that 5 per cent. per annum would have been a proper sum, and if the chief clerk had not decided that 4 per cent. should be allowed, and the question were open, I should, perhaps, have allowed interest at the rate of 5 per cent. But, as I cannot say on a question of estimate that 4 per cent. is clearly wrong, I feel it my duty, on principle, not to disturb the decision of the chief clerk, as it would certainly not be a case in which a new trial could be allowed after a verdict of 4 per cent.

It is now necessary to decide the question of costs. It is a question of great importance. In the contracts there

(a) 1 Ves. 451.

(b) 15 East. 223.

(c) 3 Drew. 91.

are clauses for the reference of all disputes to arbitration; but the defendants have constantly refused to submit to arbitration. This refusal they have persisted in at all times, before the litigation, during the litigation, and up to this stage, which ought to be its conclusion before this branch of the Court. During the last day's argument, the counsel for the defendants repeated that the defendants had all along refused to submit to arbitration, and that they refused it then.

This is a material consideration on the question of costs.

Refusing to adopt the tribunal provided by the contract, the defendants also refused to submit to the jurisdiction of this Court. The dispute as to the jurisdiction of this Court formed a great part of the argument at the hearing, and was decided by the decree of this Court on grounds and on a view which unfortunately have been much misunderstood. It is not a just view of the present litigation to say that it was occasioned by the failure of the plaintiff to deliver proper accounts. It is no part of the contract that the plaintiff should deliver accounts upon the completion of the work. On the contrary, a careful consideration of the terms and nature of the contracts as to the engineer's certificates, and of the duties imposed on the defendants by these stipulations, leads to a very unfavourable view of their conduct as the cause of this litigation. All that has been urged so strongly at the bar as to the plaintiff's having purposely delayed the delivery of the particulars of his demand is refuted by the correspondence, and is not suggested in the answer.

A violation by the defendants of the duties which the contract imposed on them as to the certificates could not fail to impose heavy loss and intolerable difficulty on the plaintiff during the progress of the work. It tended to make perfect redress almost impossible.

The arguments founded on the observations of Lord

1865.
MACKINTOSH
v.
THE GREAT
WESTERN
RAILWAY
COMPANY.
Judgment.

1866.
MACKINTOSH
v.
THE GREAT
WESTERN
RAILWAY
COMPANY.
Judgment.

Cranworth as to the duties of the engineer are wholly inapplicable to the questions in this cause. It is true that Lord Cranworth said that "the engineer in certifying was not intended to be an impartial judge—he was the organ of one of the contracting parties." But these and similar observations by other judges were made with reference to the question whether, where the engineer was himself a shareholder, his certificates should be considered void on grounds applicable to an office purely judicial. To apply these observations on a question as to the consequences of an erroneous or unjust certificate would be absurd. If the engineer is to be considered as the mere organ of the employer, as a partisan and not an impartial judge—as one who had a right, as he had an absolute power, to make his measurements partial, and in such a way as to serve the interests of the employer whose organ he was—the whole scope and purpose of the contract is violated.

It now appears clearly enough that great injustice has been done to the plaintiff in the matter of the certificates. This, on the question of costs of a litigation, should be almost decisive. The stipulations of the contract being stringent in themselves, and binding on the plaintiff, by the certificates during the progress of the works, the costs of rectifying the mistakes should be born by the party who occasioned them, and who has reaped a profit by their existence and continuation. As to those parts of the case in which the plaintiff has failed, it is necessary to consider whether any distinction should be made on the question of costs. The plaintiff's demand for Ashlar work has been disallowed, and thereby sums to the amount of 75,500*l.* have been struck off. The question as to this claim is one of singular difficulty. It seems certain that by insisting on having coarse rubble wrought and finished in a very perfect manner, although it may not be so finished in point of style as to answer the technical description of Ashlar, &c., yet to the contractor the expense

of labour may make it nearly as expensive as Ashlar, and so expensive that payment at less than Ashlar price, and merely at the ordinary scale of prices for coarse rubble, must be a very insufficient remuneration. As the plaintiff has withdrawn his motion to vary the chief clerk's certificate, it is now unnecessary to consider whether the conclusion which he arrived at after much doubt and difficulty, and after a very laborious examination as to this question of Ashlar, be perfectly correct. Although I feel satisfied that it is right not to vary the certificate, I am still more satisfied, from an examination of the evidence, that the exacting nature of the directions given by the defendant's engineer have occasioned the litigation on this point, and that the terms of the contract have, upon a question of difficult construction, exposed the plaintiff to a loss on this head, which was not contemplated, and that there has been no such failure on the plaintiff's part as to this part of the litigation, looking at the vastly complicated circumstances of this unparalleled case, as to warrant any distinction as to the costs of this part of it. So as to the question of the hardness of the strata and the trial pits. For as to these there was no separate evidence, and no amount of time occupied in the investigation to warrant any distinction.

Upon the whole case the result is this, that defendant's motion to vary the certificate must be refused. On the further consideration there must be a decree for payment by the defendants, the company, to the plaintiff of the sum certified to be due with interest. The amount of interest in the principal sum to be calculated to the date of payment, and the amount to be verified by affidavit. The costs of the defendant's motion to vary the certificate to be costs in the cause, and the defendant's, the company, to pay to the plaintiff the costs of the cause. For the reason already stated, the plaintiff's motion to vary the certificate is refused without costs.

1865.
 MACKINTOSH
 v.
 THE GREAT
 WESTERN
 RAILWAY
 COMPANY.
 Judgment.

1865.

May 5.

CLARK v. CLARK.

A devise of residuary real estate still specific, notwithstanding Wills Act, 7 Will. IV., and 1 Vic. c. 26. *Eddels v. Johnston*, 1 Giff. 29, and *Pearmain v. Twiss*, 1 Giff. 130, followed.

E. CHAPMAN, by her will dated the 28th of March, 1859, after making specific gifts of chattels to her brother, and of an estate called "Bingwood" to Betsy Cook, she gave all the rest, residue, and remainder of her estate and effects whatsoever to her brother Adam Clark. She appointed him sole executor of her will.

The testatrix died in 1860, leaving considerable real estate, which passed under the residuary devise, and Adam Clark having become bankrupt, a bill was filed by a creditor to administer the estate of the testatrix, and in such suit a question was raised whether the Bingwood estate specifically devised was liable to contribute rateably with the residuary real estate for payment of date, or whether resort should be had for it to the residuary real estate.

Argument.

Mr. *Jessel* submitted that the Wills Act, 7 Will. IV. & 1 Vic. c. 27, made no change in the rule that a devise of residuary real estate was still specific: *Eddels v. Johnson* (a), *Euis v. Smith* (b), *Pearman v. Twiss* (c).

Mr. *V. Hawkins* submitted that the reason of the old rule having failed the rule itself was abrogated. When the will spoke from the date a residuary devise was specific, but the real estate to pass under it was defined; but now that the will spoke from the death the real property to be dealt with by the will might vary as much as personal estate. Vice-Chancellor Kindersley in *Dady v. Hartridge* (d) and *Barnewell v. Iremonger* (e),

(a) 1 Giff. 22.

(b) 2 De G. & Sm. 722.

(c) 2 Giff. 130.

(d) 1 Dr. & S. 236.

(e) *Ibid.* 242, 255.

and the Master of the Rolls in *Rotherham v. Rotherham* (a) had adopted that view.

1863.
CLARK
v.
CLARK.
Judgment.

THE VICE-CHANCELLOR:—

I have already expressed my opinion that the Wills Act was not intended to make, and did not in fact make any change in the law of administration. A residuary devise of real estate is still, therefore, specific, and unless the Court of Appeal decide differently, this is the principle by which I feel bound to act.



TAYLOR v. SPARROW.

1863.
Nov. 24.

GEORGE TAYLOR, of Birmingham, by his will dated March, 1857, gave and devised unto his two nephews, Jessie and George Taylor, their heirs, executors, administrators, and assigns, all the residuary, real, and personal estate upon trust to permit his sisters Sophia and Matilda Sparrow to receive and take all the rents, interest, dividends, and annual proceeds thereof for and during the term of their natural lives, to and for their own use and benefit, and their respective receipts alone should be the only good and effectual discharge for the same; and the same should be received by the said Sophia Sparrow and Matilda Sparrow, notwithstanding any assignment or disposition by either of them made; and in case either of them, the said Sophia and Matilda Sparrow should depart this life or marry, then the one surviving and remaining unmarried should be entitled to

Devise of residuary real estate to trustees, upon trust to permit testator's sister, if single, to receive the rents for life without power of anticipation, but if either should marry or die, then the single one or survivor to take the whole; but if both married, on trust to sell and divide the proceeds among testator's nephews and nieces. The title deeds having passed into the pos-

session of the surviving tenant for life. On a bill filed by the trustees the Court refused to direct the tenant for life to deliver up the deeds to the trustees.

1863.
TAYLOR
v.
SPARROW.
—
Statement.

receive the whole of the income arising from testator's said estate and effects, as the same should become due and payable; but in case both of them should marry, then testator directed his trustees to stand possessed of his estate and effects, upon trust to sell the same, and to pay and distribute the money to arise from the sale in the manner therein mentioned, as if they had both departed this life. And from and after the decease of them, or both of them marrying, then testator directed his trustees to stand possessed of the trust-funds upon trust to pay and divide the same amongst the nephews and nieces equally.

And the testator empowered his trustees to stand possessed of the share of any nephew or niece dying before the distribution of his estate, upon trust to invest the same and apply the proceeds for the benefit of the children by the first marriage of such nephew or niece; and he also empowered his trustees, or his said sisters-in-law Sophia Sparrow and Matilda Sparrow alone, to pay to any ground landlord any sum of money which should be awarded, or which should be payable from his estate by reason of the expiration of any lease during the life or lives of his sisters-in-law, or which might be recoverable by any breach or default in the fulfilment of any of the covenants in any lease under which he held any of his properties; and the testator also empowered his said sisters-in-law to renew any lease of any part of his estate for a term of years, with power to take down such buildings as might be erected thereon, and erect others more suitable and convenient, as they should be advised.

And he charged his estate with a sum of money not exceeding 400*l.* for the above purposes, and authorised the trustees to take leases in their own names, and to hold them upon the trusts of the will. He appointed his said sisters-in-law executrixes of his will. One of the sisters-in-law, Sophia Sparrow, died in the lifetime of the testator; and, by a codicil to his will dated the 7th of February, 1861, he appointed

Matilda Sparrow, the survivor of the two sisters-in-law, the sole executrix of his will. He died in October, 1861, and at the date of his death, was entitled to freehold property at Birmingham, consisting of several houses, and the defendant Matilda Sparrow, upon the decease of the testator, possessed herself of the several title deeds relating to the testator's freehold and leasehold properties. The plaintiffs, as devisees in trust, applied to the defendant to hand over these deeds to them. This she refused to do. The trustees then instructed their solicitor to make a formal demand for the deeds, which he did in January, 1863, and the defendant having still refused to deliver them up, on the following 5th of March this bill was filed against the tenant for life, Matilda Sparrow and Jacob Townshend Taylor, as one of the residuary legatees in remainder, praying, amongst other things, for the proper administration of the trusts of the will, and "that all proper directions might be given respecting the custody of the title-deeds and securities relating to or forming part of the testator's estate."

1863.
TAYLOR
v.
SPARROW.
—
Statement.

Mr. *Bacon* and Mr. *Renshaw* contended that either as trustees or remainder, the plaintiffs were entitled to the custody of the deeds. The custody of a tenant for life who did not represent the inheritance was irregular and improper. As trustees the plaintiffs could not discharge the duties cast upon them without possession of the deeds. They cited *Langdale v. Briggs* (a), *Warren v. Rudall* (b).

Argument.
—

Mr. *Malins* and Mr. *C. Hall*, for the tenant for life, submitted that she had the legacies, and was entitled to the custody of the deeds.

(a) 8 De G. M. & G. 391, 416.

(b) Joh. & H. 1.

1863.
TAYLOR
v.
SPARROW.
—

Mr. O. Morgan, for a defendant, referred to *Lee v. Prieaux* (a).

The VICE-CHANCELLOR:—

Judgment.

It is not the rule of the Court to take the deeds from the tenant for life into whose hands they have passed, nor is it usual to demand security for such deeds where it is not alleged that they were endangered by remaining in the custody of the tenant for life. The case of *Lady Langdale v. Briggs* has no application to this case, because the facts are totally different.

Mr. Lewin in his book on trusts (b) appears to approve of a rule in early times acted on that whoever first received the deeds is at liberty to retain them. The rule is referred to in *Foster v. Crabb* (c), where the rule is recognised; but that is quite intelligible, because at law it could not be argued that possession is wrongful where the holder has an interest in the property, and in such a case a court of law would not change the custody of the deeds. Neither will this Court interfere with the possession of the deeds by the tenant for life where there is no suggestion that they are endangered by remaining in such custody. The case of *Warren v. Rudall* (d) the rule here referred to, appears to be one of technical application. It is observable, also, that there is no decision in that as to any such rule. There is no ground in my opinion for changing the custody of the deeds here.

(a) 3 B. C. C. 381.

(c) 12 C. B. 136—379.

(b) 3rd. Ed. 592; 5th ed. 482,

(d) 1 Joh. & H. (1).

c. 23—6.

1863.

SIMPSON v. MALHERBE AND OTHERS.

June 5, 6 & 7.

THIS bill was filed by the plaintiff J. A. Simpson, against the defendant G. L. Malherbe, the Messrs. Sharp and Mr. A. de Berg, the solicitors and agents of the Russian Government, praying for an injunction to restrain the defendant Malherbe from further prosecuting an action at law which he had commenced against the plaintiff and other persons, and for a decree for specific performance of an alleged agreement whereby the defendant's agent had agreed to sell to the plaintiff for the sum of 13,000 Polish bonds of the value of 168,000 roubles.

Where a suit was instituted not for the *bona fide* purpose of obtaining the relief prayed, but for a collateral and improper purpose, and the plaintiff failed to establish any right to the relief prayed, and the bill was dismissed, the decree was made with a declaration that the suit was improperly instituted and directed the plaintiff not only to pay the costs but all charges and expenses properly incurred in the suit.

The case alleged by the bill was as follows:—In February, 1864, S. L. Hernitz, by the direction of a Mr. Stanislaus Foerster, was instructed to sell the bonds comprised in the alleged agreement, and in order to effect a sale applied to Messrs. Wilkinson, of 25, Birchin Lane, commission agents, and informed him that he was desirous of selling a considerable amount of such securities. He also delivered to Messrs. Wilkinson a bond for thirty roubles with the coupons payable to bearer as a specimen and directed him to find a purchaser for the amount he held, viz. 160,000 roubles. The bill alleged that Messrs. Wilkinson thereupon applied to the plaintiff to know whether he would take the securities and give them (Messrs. Wilkinson) authority to agree to take them, and the plaintiff having assented, Messrs. Wilkinson wrote to Hernitz as follows:—

“ 25, Birchin Lane, Feb. 25, 1864.

“ Sir,—We offer for 168,000 (one hundred sixty thousand) roubles Polish Hyashek obligations (13,000=thir-

1865.
 SIMPSON
 v.
 MALHERBE
 AND
 OTHERS.

Statement.

teen thousand pounds), equal to fifty-eight per cent., and 2s. 8d. for each rouble, subject to our commission as agreed, two per cent.

"Yours, obediently,

"T. WILKINSON AND Co."

Hernitz immediately wrote and signed at the foot of the letter as follows:—

"I accept the above terms.

"HERNITZ."

Messrs. Wilkinson thereupon delivered the thirty rouble bond to the plaintiff.

Subsequently to the contract, the plaintiff ascertained that Hernitz was acting in the sale for the defendant Malherbe, and that the bonds were in the possession of Foerster as Malherbe's agent. The bill alleged that the bonds had been retained by Messrs. Sharp, the solicitors of the Russian Government; that the defendant Malherbe was well aware that the plaintiff was the actual purchaser, and that the contract was entered into by Messrs. Wilkinson, as agents for Malherbe, and that he had adopted and ratified the contract, but that subsequently to the contract Foerster had paid bonds for 165,000 roubles to Messrs. Sharp. The bill alleged further that Messrs. Sharp refused to part with the bonds on the ground that they were claimed by the Russian government as stolen by the insurgent government of Poland. The bill alleged that the defendant Malherbe had commenced an action against Messrs. Sharp for the recovery of the bonds. The bill further alleged that Messrs. Sharp intended to dispose of the bonds as agents of the Russian Government, and prayed for an injunction against the Messrs. Sharp to restrain them from parting with the bonds to any person other than the plaintiff.

The bill charged that Messrs. Sharp had full notice of the contract and submitted that they were trustees for

the plaintiff, that the plaintiff had requested Foerster to deliver up the balance of the bonds of the value of 2970 roubles or to direct Messrs. Sharp to deliver the bonds for 165,000 roubles to the plaintiff.

The defendant Malherbe in his answer alleged that the plaintiff never had any *bonâ fide* intention of purchasing the bonds, but that he was acting collusively with the Russian Government and its agents in this country in order to obtain the possession of the bonds and to ascertain the numbers of them.

The defendant Malherbe, who was a manufacturer of arms at Liege, and had dealings with the Government of Poland, put in his affidavit in which he stated the nature of the transaction.

The affidavit was made out of the jurisdiction, and it was objected that, as plaintiff had no opportunity of cross-examining the defendant, it could not be read. The Vice-Chancellor overruled the objection. The material part of the affidavit was as follows:—

“In the course of business during 1863 I received, at different times, by way of payment under *bonâ fide* contracts entered into by me, divers *lettres de gage* or bonds of the Crédit Foncier of the kingdom of Poland. The Crédit Foncier is an association established in Poland for the purpose of advancing money to be employed in the improvement of land and agriculture, and for other business purposes. I thus became in 1863 the *bonâ fide* owner of such *lettres de gage* to the amount of over 5,000,000 francs, or thereabouts. Being desirous of realising some of the bonds, I instructed Foerster, in the bill named as my agent, to negotiate the sale of a number of them, and Hernitz was subsequently instructed, by the direction of Foerster, to negotiate some of them.

“In February, 1864, Hernitz having seen an advertisement of the firm of T. M. Wilkinson & Co., financial agents, of 25, Birchin Lane, in the City of London, called at the office of the firm and saw Mr. T. Wilkinson. In

1865.
SIMPSON
v.
MALHERBE
AND
OTHERS.
—
Statement.

1865.
SIMPSON
v.
MALHERBE
AND
OTHERS.
—
Statement.

the course of conversation Hernitz asked Wilkinson if he could negotiate the sale of bonds of the Crédit Foncier of Poland, the market for which had been injured by agents of the Russian government having falsely, and for political purposes, published the number of the bonds stolen. T. Wilkinson said he thought he could, and the circumstances connected with the bonds proposed to be negotiated were then explained to Wilkinson, and a bond for thirty roubles, with the coupons belonging thereto, were handed to him as a sample. Wilkinson said he thought he could find a capitalist to purchase the bonds, and made an appointment with Mr. Hernitz to call on him the following day. The said Hernitz, according to appointment, called at the said offices on the following day, and found the plaintiff there,

“The plaintiff, who was wholly unknown to the said Hernitz, said he was Mr. Wilkinson’s partner, and knew all about the business; and to prove that he was such a partner, he opened a book in which the said T. Wilkinson had made entries of matters of business upon which the said Hernitz had spoken to him on the previous day.

“The plaintiff then said he had found a capitalist who had a large amount of money to invest in securities of the description proposed to be negotiated, and the terms were discussed and finally agreed, subject to approval, which was to be signified through Foerster or otherwise. The terms arranged were, payment in cash of 13,000*l.* for bonds of the nominal amount of 168,000 silver roubles. The said Hernitz waited for the purpose of seeing the said T. Wilkinson, and he then, in the presence of the plaintiff, wrote a letter for the purpose of obtaining necessary confirmation of the agreement for the sale of the bonds. The said T. Wilkinson then came in and inquired if the terms were satisfactory, and would be likely to be accepted. The said Hernitz said he could not tell, but would write and ascertain, and it was arranged that a further appoint-

ment should be made as soon as he could obtain an answer. The said Hernitz then signed his acceptance of the said terms, but intimated that it was to be subject to approval as aforesaid.

“ The terms and acceptance, as so offered and agreed to by the said Hernitz, are set forth, I believe, correctly in the memorandum stated in the third and fourth paragraphs of the plaintiff’s bill. The said Hernitz called again on Monday, the 29th of February, 1864, at the offices of the said T. Wilkinson & Co., and said that he had not yet received a reply ; but he being satisfied that the terms would be accepted, authorised the said T. Wilkinson to close the sale.

“ On Tuesday, March the 1st, 1864, the said Hernitz called again on the said T. Wilkinson & Co., at the said office, and told them the conditions were accepted, and he appointed Wednesday (the following day), at twelve o’clock, to complete the sale, if the bonds should be in London by that time. Accordingly, on Wednesday, the 2nd, the said Hernitz, accompanied by the said Fœrster and a Mr. Tuchman, called at the offices of the said T. Wilkinson & Co. The plaintiff having ascertained that they had the bonds with them, said, ‘ We will go to the capitalist.’ The plaintiff and the said T. Wilkinson thereupon took the said Hernitz and Fœrster and Mr. Tuchman together to the office of the so-called capitalist, at Gresham House, in the City of London, which turned out to be the offices of the defendants W. Sharp and H. Sharp, who are attorneys in London, carrying on business at Gresham House, and who are the solicitors in London to the Russian government. The plaintiff then introduced the said Hernitz, Fœrster, and Mr. Tuchman to a person whom they found in a room alone, and whom they represented to be, and who himself professed to be, this capitalist, and they were afterwards joined by two other persons there. The said Hernitz, Fœrster, and Tuchman were unacquainted with any of the said persons, but they

1865.
 SIMPSON
 v.
 MALHERBE
 AND
 OTHERS.
 —
Statement.

1865.
SIMPSON
v.
MALHERBE
AND
OTHERS.
—
Statement.

afterwards discovered that the so-called capitalist to whom they were first introduced, and who took upon himself to act in that character, was the defendant, W. Sharp, and that the two persons who joined him as aforesaid were his brother and partner, the defendant H. P. Sharp, and A. de Berg, the Russian consul. The defendant took the bonds for the purpose, as he alleged, of examining them. He looked over them, and then said that the bonds were stolen, and insisted on keeping them, and he (the plaintiff), and the defendant H. P. Sharp, and the said T. Wilkinson and A. de Berg aiding and abetting him therein, kept them accordingly, notwithstanding the remonstrances of the said Messrs. Hernitz and Foerster. They being foreigners and unacquainted with law, and without professional advice, were unable to help themselves.

“ It is alleged that Foerster succeeded in retaining the coupons to the bonds. The defendant W. Sharp being desirous to make the fraud practised on Hernitz look as little like a robbery as possible, then forced on him a document purporting to be, but which was not in fact (inasmuch as one bond for 3000 roubles was omitted from the list, and the whole amount of bonds now in the possession of the plaintiffs W. Sharp and H. P. Sharp, and of the said T. Wilkinson and A. de Berg is, in fact, of the value of 168,030 roubles) an acknowledgment of the possession of the said bonds with their numbers attached. I have made every endeavour to obtain possession of the said bonds from the defendants W. and H. P. Sharp; but they, acting in collusion, as I believe, with the plaintiff, as well as with the said T. Wilkinson and A. de Berg, have refused to return them, and still hold the same. I have, therefore, been obliged to commence, and have commenced, an action at law against the said A. de Berg, W. Sharp, H. P. Sharp, T. Wilkinson, and the plaintiff in this suit, to recover damages from them for fraud and conspiracy, not only in defrauding me of the said bonds or

lettres de gage, which were taken possession of by the defendants the attorneys W. and H. P. Sharp, in concert with the plaintiff and the said T. Wilkinson and A. de Berg, under the pretence of buying them as capitalists, and also in respect of their proceedings, which have had the effect of destroying the value of and rendering unmarketable the rest of the bonds or *lettres de gage* held by me as aforesaid, which are of the value of 5,000,000 francs and upwards. I believe that the whole scheme whereby the said Hernitz was induced to sign the memorandum was a mere fraud on the part of the plaintiff, in concert with the other defendants and T. Wilkinson and A. de Berg, to obtain possession of the bonds, and that the plaintiff never intended to purchase, and was not and is not in a position to pay for the same. And that this suit is instituted by him, with the defendants W. and H. P. Sharp, and also the said A. de Berg, with the view of screening them, if possible, from the consequences of their fraudulent conduct, and of preventing the exposure that must take place if the action at law should proceed, and also for collateral and political purposes, to lock up the bonds and to destroy the credit thereof, and of other bonds of a similar character. The fraud practised upon me by the said defendants W. and H. P. Sharp, as solicitors of the Russian government, in obtaining possession of the said bonds, is, I believe, a sequel only to a similar attempt some time since made in Paris. While I was there and had possession of the said bonds the police (set in motion by the Russian embassy there) entered my room at night and took all the Polish bonds in my possession (including the bonds now in question in this suit), under the pretence that they had been stolen, and subjected them to a minute examination and scrutiny; but the authorities in France were satisfied that I was entitled to hold and retain the said bonds, and that the charges of the Russian government were unfounded, and they accord-

1865.
 SIMPSON
 v.
 MALHERBE
 AND
 OTHERS.
 —
Statement.

1865.
 SIMPSON
 v.
 MALHERBE
 AND
 OTHERS.
 —
Statement.

ingly returned the said bonds to me with an apology for what they had done."

I have a considerable number of bonds of a similar description to those mentioned in the bill which may be purchased in the market by any one honestly desirous of purchasing and paying for the same. I am ready and willing to deliver to the plaintiff other bonds similar in all respects to those retained by the Russian government at the price agreed upon, provided I am sufficiently guaranteed against a recurrence of the fraud attempted to be practised on me by the defendant.

Argument.
 —

Mr. *Malins*, Mr. *Jessel*, and Mr. *Hall* submitted that the plaintiff was clearly entitled to a decree for specific performance. As to a decree for specific performance of a contract to purchase shares they cited: *Duncuft v. Albrecht* (a); as to stolen property they cited: *Shaw v. Fisher* (b), *Millier v. Rase* (c), *Clark v. Shee* (d), *Easley v. Crock* (e). They offered to abandon the injunction.

Mr. *Bacon* and Mr. *Druce* for Malherbe.

This is a collusive suit, instituted not for the purpose of obtaining any decree for specific performance, but in aid of an attempt, indirectly, to prevent the defendant from recovering possession of the bonds of which he had been defrauded. Even for a laudable object this Court would not allow its machinery to be used for any purpose other than that avowed on the record, and *a fortiori* would not allow a plaintiff to seek the repetition of a fraud by means of the process of the court. They cited *Gurney v. Gurney* (f).

(a) 12 Sim. 189.

(b) 2 De G. & Sm. 11.

(c) Bur. 452.

(d) 1 H. Cowper, 197.

(e) 10 Bing. 243.

(f) 1 H. & M. 413.

Mr. *Green*, Mr. *C. Hall*, and Mr. *Talfourd Salter* appeared for Messrs. Sharp.

SIMPSON
v.
MALHERBE
AND
OTHERS.

Judgment.

The VICE-CHANCELLOR :—

The bill in this suit is filed ostensibly for the specific performance of a contract for the sale of certain Polish bonds, and the decree which is sought has reference to these particular bonds, in respect of which an injunction has also been asked, and which are alleged by the plaintiff to be in the possession of the Russian government. At the bar the case as to the particular bonds and the injunction has been abandoned by the plaintiff, and with that abandonment the whole of this suit as to the particular bonds is also abandoned. The plaintiff's case has been opened and concluded without any evidence having been tendered on his behalf. The decree, moreover, which has been asked for at the bar proceeds on the footing of an offer contained in the defendant Malherbe's answer, to hand to the plaintiff other bonds in lieu of those retained by the agents of the Russian government; but that offer has been guarded with the condition that Malherbe should be guaranteed against the recurrence of a fraud similar to that which, according to his own statement, has already been practised upon him. The offer mentioned in the answer is, however, so made that it is impossible for the plaintiff to avail himself of it, because he cannot adopt the condition attached to the offer. The Court, therefore, has no choice but to dismiss this bill. Various passages in the answer have been read and commented on by both sides, which contain allegations of fraud against the plaintiff. It has been said that the plaintiff has had no opportunity of meeting these allegations, but what is meant by such an assertion I am at a loss to understand. The agents of the Russian government are no strangers to the answer of the defendant Malherbe. They also hold the bonds themselves in their

1865.
SIMPSON
v.
MALHERBE
AND
OTHERS.
—
Judgment.

hands, and they have refused the opportunity offered to them of cross-examining the plaintiff. No doubt, as between co-defendants, the matters put in issue between the plaintiff and the other defendants to the suit cannot be discussed as issues between the plaintiff and the defendants. But the case made by the defendant Malherbe in his answer demands the serious consideration of the Court. He there says that the suit "is instituted by the plaintiff in collusion with the defendants, the agents of the Russian government, and another person, with the view of screening them, if possible, from the consequences of their fraudulent conduct, and of preventing the exposure that must take place if the action at law should proceed, and also for collateral and political purposes to lock up the bonds and to destroy the credit thereof, and of other bonds of a similar character." The witness Hertz has been cross-examined by the plaintiff in open court, and there is enough in his examination to show that the suit has been improperly instituted; that it has, in fact, been instituted for a collusive purpose.

The bill must therefore be dismissed, with a declaration that the Court, being of opinion that the suit has been improperly instituted, the bill must be dismissed with costs against Malherbe, and that the plaintiff shall pay to Malherbe not only the costs of the suit, but his costs, charges, and expenses properly incurred in reference thereto. The bill must also be dismissed with costs against the agents of the Russian government. The decree is an unusual one, but so is the suit; and when the Court finds that a suit is instituted not *bonâ fide* for the direct ostensible purpose, but with a view to some ulterior and improper purposes, its duty is to see that those who are improperly sued in such a matter have justice done to them by a full and proper indemnity against all the expenses which they have unjustifiably been obliged to incur.

INDEX

TO THE

PRINCIPAL MATTERS.

ACCOUNT.

1. Demurrer to a bill seeking a discovery and an account of goods sold by the defendant, on the price of which the plaintiff was entitled to a commission, overruled with costs.

On questions of account, Courts of Equity and Courts of Law possess concurrent jurisdiction, and the decision as to the proper tribunal must be governed by considerations of convenience. *Phillips v. Phillips*, 9 Hare, 471, observed on. *Shepard v. Brown*. 208

2. On a bill by a creditor against an inspector under a deed for the benefit of creditors who had neglected to act on the provisions of the deed as to getting in the debtor's estate, the Court decreed an account against the trustee for wilful default, with annual rests and interest, and for the costs of the suit.

The Court will treat inspectors with reasonable indulgence, but at the same time will require of them reasonable diligence in performing the duties prescribed and undertaken. *Coppard v. Allen*. 497

3. On a bill by the plaintiff, who, while lodging at an hotel, and seriously ill, executed a bond to the

ACCOUNT.

landlord for 1000*l.* payable at six months' date, to secure moneys paid and advanced for the plaintiff for hotel charges, the landlord undertaking to rectify all errors in the accounts, the Court restrained an action at law on the bond, the plaintiff giving judgment for the amount of the claim. *Edwards-Wood v. Baldwin*. 618

4. Executors and devisees in trust to sell, having an option of postponing the sale for five years were directed in such case to pay the income to the tenant for life. At the end of five years they had paid no legacies, rendered no account, though frequently requested so to do, nor dealt with the estate, but claimed remuneration for their services—Ordered to pay the costs of a suit to administer the trusts of the will. *Wroe v. Seed*. 425

5. Demurrer to a bill alleging that the defendants had received moneys on behalf of the plaintiff, of which he could obtain no account without discovery—Allowed with costs.

Where the relation between a principal and agent partakes of a

718 ADMINISTRATION.

fiduciary character this Court has jurisdiction, and will direct an account, though the receipts and payments are all on one side. *Phillips v. Phillips*, 9 Hare, 471, and *Dinwiddie v. Bailey*, 6 Ves. 136 considered. *Hemmings v. Pugh*. 456

See ADMINISTRATION.
BUILDING CONTRACT.
PRODUCTION.
QUASI TRUSTEE.
SOLICITOR AND CLIENT, 2.

ACCOUNT (REFUSAL TO).

Where the trustees under a will refused to furnish the solicitor of the residuary legatee with an account, though they offered to permit the plaintiff herself or a professional accountant to inspect the accounts, the Court ordered them to pay the costs of a suit to administer the testator's estate. *Kemp v. Burn*. 348

ACQUIESCENCE.

See MARRIAGE SETTLEMENT, 1.
SURETY.

ACTION.

See EJECTMENT.

ADAPTION OF DISCOVERY.

See PATENT.

ADMINISTRATION.

Bill to administer the estate of a deceased person found lunatic by commission, and for an account of the dealings of the defendants with his estate from the date of the lunacy till his death, alleging fraud.

Demurrer by the defendants, who were the executors and trustees of a will made before the lunacy, and

AMENDED BILL.

also committee and surety under the commission, that the proper jurisdiction was in lunacy—Overruled with costs. *Scammel v. Light*. 127

See ACCOUNT, 4.
CHARGING ORDER.
INDEMNITY.
PARTNERSHIP.

ADVANCE.

See ORDER AND DISPOSITION, 2.

ADVISER.

See PROFESSIONAL ADVISER.

AFFIDAVIT.

See OFFICE COPY.

AFTER-ACQUIRED PROPERTY.

See MARRIAGE SETTLEMENT, 2.

AGENT.

See ACCOUNT, 5.

AGREEMENT.

See PRESSURE.

ALIMONY.

See SETTLEMENT, 2.

ALLOTMENT.

See FRAUD, 1.

AMENDED (INCONSISTENT) BILL.

A bill being by leave granted on hearing the demurrer amended by impeaching the codicil as being executed by the testator while in a state of mental incapacity. The defendant thereupon moved to dis-

BANKRUPTCY.

miss the amended bill as being inconsistent with the original bill, but the Court refused the motion, and directed the costs to be costs in the cause. *Parker v. Nickson.* 311

ANNUITY.

See PENSION.

ANTECEDENT DEBT.

See ORDER AND DISPOSITION, 1.

APPOINTMENT.

See SETTLEMENT, 2.

ARRANGEMENT.

See QUASI TRUSTEE.

ASSETS.

See PARTNERSHIP.

ASSIGNEES.

See FRAUD, 2.

ASSIGNMENT (STATUTORY FORM OF).

See ORDER AND DISPOSITION, 1.

ASSIGNMENT.

See PENSION.
SETTLEMENT, 1.

ATTACHMENT.

See SPECIFIC PERFORMANCE, 3.

BANKERS.

See PRESSURE.

BANKRUPTCY.

See ORDER AND DISPOSITION, 1, 2.
PARTNERSHIP.
FRAUD, 2.

BREACH OF TRUST. 719

BENEFICIAL INTEREST.

See BREACH OF TRUST, 1.

BILL.

See AMENDED (INCONSISTENT BILL.)

BILL BY ONE SHAREHOLDER ON BEHALF OF OTHERS.

See FRAUD, 1.

BILL (DISMISSAL OF).

See LEASE.

BILL IN CHANCERY.

See FRAUD, 1, 2.

BILL OF SALE.

See LOSS BY EXECUTOR.
ORDER AND DISPOSITION, 1.

BILL TO RECTIFY LEASE.

See LEASE.

BOND.

See ACCOUNT, 3.
SURETY.

BOOK OF REFERENCE.

See DEPOSITED PLANS, 2.

BREACH OF CONTRACT.

See SPECIFIC PERFORMANCE, 1, 3.

BREACH OF COVENANT TO REPAIR.

See EJECTMENT.

BREACH OF TRUST.

1. The trustee of a sum of stock, being beneficially entitled to one

720 BUILDING CONTRACT.

moiety undivided, assigned his interest to a mortgagee, who placed a *distringas* on the moiety. The trustee afterwards sold out a moiety and absconded. On a bill by the *cestui que trust* of a moiety, the Court held that he was entitled to the remaining moiety, but gave the mortgagee his costs. *Wilkins v. Sibley*. 442

2. Where a husband entitled to the interest of a fund for life, with remainder to his wife for life, induced the acting trustee to pay him the money on the written consent of the wife, the trustee having died, his estate was held liable to make good the moneys so paid, on a bill filed by the widow and the surviving trustee. *Cresswell v. Dewell*. 460

BREWERY.

See SPECIFIC PERFORMANCE, 2.

BRIDGE.

See DEPOSITED PLANS, 1.

BUILDING CONTRACT.

Where on the investigation of a complicated demand for work and labour done, and other matters, or performance of work under a contract with a railway company for works of enormous extent, the chief clerk's certificate, after a laborious examination, ascertained the amount due, the Court will not allow the result so certified to be varied as to the whole or any part of it unless a case of clear mistake or gross abuse is shown.

In such cases the certificate of the chief clerk should not be questioned on any ground which would not be a ground for moving for a new trial or for setting aside the verdict of a jury.

CHARGING ORDER.

Where by a contract a sum of money is payable at a time certain and upon a sum to be ascertained on certain data, but a dispute occurs as to the amount which is settled by the Court, interest is payable under the Statute 3 & 4 Wm. IV. c. 42. *Mackintosh v. Great Western*. 683

BUILDING LEASE.

See LANDLORD AND TENANT.

BYE-LAWS.

See LOCAL GOVERNMENT.

CALL

See FRAUD, 1.

CAPITAL.

See WILL, 6.

CERTIFICATE.

See BUILDING CONTRACT.

CESTUI QUE TRUST.

See BREACH OF TRUST, 1, 2.

CHARGE ON LAND.

An order of the Probate Court for the payment of money is not a charge on land within the meaning of the 1 & 2 Vic. c. 110. *Pratt v. Bull*. 117

See SOLICITOR.

CHARGING ORDER.

CHARGING ORDER.

Where a solicitor had obtained for a client a foreclosure decree (who had subsequently died, and a decree for administration of his estate had been made) the Court, under the 28th section of the 23 & 24 Vic. c.

COMPENSATION.

127, made a charging order for the costs of the suit against the real estate of the client. *Wilson v. Round.* 416

CHARITY.

See WILL, 6.

CHATTELS.

See EXECUTION.

LIEN.

CHEMICAL CURIOSITY.

See PATENT.

CHEMICAL INVENTION.

See PATENT.

CHEMISTRY.

See PATENT.

CHILD.

See FATHER AND CHILD.

CLIENT.

See SOLICITOR AND CLIENT, 1, 2.

CO-DEFENDANT.

See STAY OF PROCEEDINGS.

COMMISSION.

See ACCOUNT, 1.

COMPANY.

See FRAUD.

COMPENSATION.

*See LANDLORD AND TENANT.
SPECIFIC PERFORMANCE, 1, 3.*

CONTRACT. 721

COMPOSITION.

See FRAUD, 2.

COMPULSORY POWERS.

See INVESTMENT.

CONCEALMENT.

*See MARRIAGE SETTLEMENT, 1.
SOLICITOR AND CLIENT, 1.*

CONCURRENT JURISDICTION.

See ACCOUNT, 1.

CONDITIONS OF SALE.

See DEPOSIT.

CONDITION.

See EXECUTION.

CONFIDENTIAL RELATION.

See SOLICITOR AND CLIENT, 1, 2.

CONSENT OF WIFE.

See BREACH OF TRUST, 2.

CONSIDERATION.

*See MARRIAGE.
COVENANT TO SETTLE.*

CONSTRUCTIVE NOTICE.

See MARRIAGE SETTLEMENT.

CONTRACT.

See MARRIAGE.

CONTRACT (NON-PERFORMANCE OF).

See SPECIFIC PERFORMANCE, 3.

CONTRACTOR.

See BUILDING CONTRACT.
EXECUTION.

CONTRARY INTENTION.

See WILL, 1.

CONVENIENCE.

See ACCOUNT, 1.
BUILDING CONTRACT.

CONVERSION.

See WILL, 5.

CONVEYANCE.

See PROFESSIONAL ADVISER.

CONVICTION.

See VOLUNTARY SETTLEMENT.

COPYRIGHT.

Where the plaintiff composed certain tales for the defendant for publication in the *London Journal*, of which he was the proprietor—*Held* that the subsequent publication of such tales in a weekly supplementary number, for sale with or without the current number, was a "publication separately" within the meaning of the 18th section of 5 & 6 Vic. c. 45.
Smith v. Johnson 632

COSTS.

See ACCOUNT, 1, 2, 4, 5.
ACCOUNT (REFUSAL TO).
ADMINISTRATION.
BREACH OF TRUST, 1.
CHARGING ORDER.
FORFEITURE.
FRAUD, 1.
LOSS BY EXECUTOR.
MARRIAGE.

DEBTS.

OFFICE COPY.
PARTNERSHIP.
PRIVILEGED COMMUNICATION.
PROFESSIONAL ADVISER.
SETTLEMENT, 2.
SOLICITOR.
STAY OF PROCEEDINGS.

COVENANT.

See MISTAKE.

COVENANT TO SETTLE.

Covenant by husband and wife to settle "all real or personal estate, property, or effects to which the wife or the husband in her right shall by gift, descent, succession, or otherwise become entitled"—*Held* to include reversionary interests in Consols, which fell in by the death of a tenant for life, after the decease of both husband and wife. *Graftley v. Humpage*, 1 Beav. 46, followed. *Re Hughes's Trusts*. 432

See MARRIAGE SETTLEMENT, 2.

CREDITOR.

See ACCOUNT, 2.
JUDGMENT CREDITOR.
PARTNERSHIP.
SURETY.

CROWN.

See VOLUNTARY SETTLEMENT.

DAMAGES.

See SPECIFIC PERFORMANCE, 1, 3.

DEBTS.

See EXECUTION.
PARTNERSHIP.
PENSION.
WILL, 6.

DEBT SECURED BY DEPOSIT
OF TITLE DEEDS.

See SETTLEMENT.

ORDER AND DISPOSITION, 1.

DEBTOR AND CREDITOR.

See LIEN.

DECORATIVE REPAIR.

See SPECIFIC PERFORMANCE, 1.

DECREE.

See PARTNERSHIP.

DEED NOT
ACKNOWLEDGED.

See WILL, 5.

DEED OF INSPECTORSHIP.

See ACCOUNT, 2.

DEFAULT.

See DEPOSIT.

DELAY.

See ACCOUNT, 4.

DELIVERY (PASSING BY).

See LIEN.

DEMURRER.

See ACCOUNT, 1.

ADMINISTRATION.

AMENDED INCONSISTENT BILL.

FRAUD, 1, 3.

OPENING FORECLOSURE DECREE.

PRIVILEGED COMMUNICATION.

UNTRUE AVERMENT.

DEMONSTRATIVE LEGACY.

See WILL, 6.

DEPOSITED PLANS.

1. Where the plans and sections for the construction of a bridge over a public road described the breadth of the proposed bridge as forty-five feet, the Court restrained the company from constructing the said bridge except in accordance with the plans and sections so deposited.

The 13th section of the Railway Clauses Act, which provides "that where in any place it is intended to carry the railway on an arch or arches, or by a viaduct, as marked on the plans and sections, the same shall be made accordingly," means according to such plans and sections. *Attorney-General v. The Tewkesbury and Malvern Railway Company.* 333

2. Where the plans deposited by a railway company delineated a field, showing the line, the limits of deviation, and the boundaries on one side of those limits, but leaving the boundaries on the other side undefined, the Court restrained the company from taking the land beyond the limits of deviation on the undefined side, though the name of the owner of the whole field was described in the book of reference. *Wrigley v. The Lancashire and Yorkshire Railway Company.* 352

DEPOSIT.

At a sale under a decree by the Court, the conditions provided that in case of nonpayment of the purchase-money or other default, there should be a resale, and the deficiency, if any, to be made good by the purchaser, but containing no stipulation as to the return or forfeiture of the deposit. The purchaser paid the deposit, and afterwards became bankrupt, and the assignees having declined to complete, the Court held the deposit forfeited.

724 DIVERSION OF ROAD.

Where the purchaser makes default, no express stipulation is necessary to entitle the vendor to the deposit: *Semble. Depree v. Bedborough.* 479

DEPOSIT OF DEEDS.

See ORDER AND DISPOSITION, 1.

DILIGENCE.

See ACCOUNT, 2.

DISCRETION.

See LOSS BY EXECUTION.

DISCOVERY.

See ACCOUNT, 1, 5.
PATENT.

DISMISSAL OF BILL.

See DIVERSION (PERMANENT) OF ROAD.
FRAUD, 2.
LEASE.

DISPOSITION.

See ORDER AND DISPOSITION, 1, 2.

DISTRINGAS.

See BREACH OF TRUST, 1.

DIVERSION (PERMANENT) OF ROAD.

The 16th section of the Railway Clauses Consolidation Act authorises the permanent diversion of public roads, and not only a temporary diversion for the purpose of constructing the railway; and the Court dismissed a bill filed for an injunction to restrain such diversion. *Phillipps v. London and Brighton Railway Company.* 46

EQUITY OF REDEMPTION.

DIVORCE.

See SETTLEMENT, 2, 3.

DOWER.

See WILL, 4.

DUTIES.

See ACCOUNT, 2.

EAST INDIA COMPANY.

See PENSION.

EJECTMENT.

Where a lessor brought ejectment for breach of covenant to repair within three months after notice, it appearing that out of twenty-two items twenty had been proceeded with, and fourteen completed; that the works had been partially delayed by weather, and that no further remonstrance had been made by the leaseors—the Court restrained the action, and directed an inquiry whether the covenants had been performed. *Bargent v. Thomson.* 473

See LANDLORD AND TENANT.

ELECTION.

See WILL, 4.

ENGAGEMENT.

See MARRIAGE SETTLEMENT, 1.

ENQUIRY.

See EJECTMENT.

EQUITY OF REDEMPTION.

See JUDGMENT CREDITOR.
SOLICITOR AND CLIENT, 1.

EXECUTORY CONTRACT.

EQUITY TO SETTLEMENT.

See SETTLEMENT, 1.

EQUITABLE MORTGAGE.

See ORDER AND DISPOSITION, 1.

ERROR.

See ACCOUNT, 3.

ERROR IN LEASE.

See LEASE.

EVIDENCE.

*See PRIVILEGED COMMUNICATION.
PRODUCTION.*

EXECUTION.

Rails and other chattels which by the terms of the contract when placed on the land became the absolute property of the company, the contractor to have no property therein, except the right of using them on the land for the purpose of the works, except on completion of the line, as a condition precedent, the plant was to be given to the contractor as part consideration, or if used by the company to be paid for—*Held*, not liable to be taken in execution for the company's debts. *Beeston v. Marriott.* 436

EXECUTORS.

See ACCOUNT, 4.

INDEMNITY.

QUASI TRUSTEE.

UNTRUE AVERMENT, 1.

SOLICITOR AND CLIENT, 3.

EXECUTORY CONTRACT.

See ORDER AND DISPOSITION, 2.

FELONY.

725

EXPECTANT HEIR.

*See POST NUPTIAL SETTLEMENT, 2.
FRAUD, 3.*

EXPENDITURE:

See LANDLORD AND TENANT.

EXPERIMENTS.

See PATENT.

EXPRESS STIPULATION.

See DEPOSIT.

FACTORY.

See LOCAL GOVERNMENT.

FALSE ENTRIES.

See PRODUCTION.

FATHER AND CHILD.

Gift by a daughter of a large part of her property to her father set aside with costs, it appearing that it was made shortly after attaining twenty-one, and while the father was acting as her guardian, and was regarded with implicit confidence as the sole relative capable of managing her affairs.

Where a gift is impeached on the ground of undue influence, in order to sustain the gift the Court requires the clearest and most unequivocal evidence that the transaction was fully understood by and was the voluntary and deliberate act of the donor. *Hatch v. Hatch*, 9 Ves. 296, considered; *Davies v. Davies* 417

FELONY.

See PRESSURE.

VOLUNTARY SETTLEMENT.

FIDUCIARY RELATION.

See PROFESSIONAL ADVISER.
ACCOUNT, 5.

FORECLOSURE.

See CHARGING ORDER.
OPENING FORECLOSURE DECREE.

FORFEITURE.

A testator having bequeathed the dividends of a fund to his niece for life, remainder to her children, by a codicil reciting that her husband was dead, declared that in case she married again without the consent of the trustees, she should forfeit the legacy and take only 50l. a year. The niece, without the consent or knowledge of the trustees married, received the dividends for some time, and died. On a bill by the trustees against the husband (who denied knowledge of the clause of forfeiture) the Court declared the husband subject to the liabilities that affected the wife. *Charlton v. Coombes* 382

See DEPOSIT.

FRAUD.

1. Where a plaintiff filed a bill on behalf of himself and all other shareholders except the defendants, against the company and the directors and solicitors, alleging misrepresentation and suppression, and praying for repayment of the deposits—a demurrer was allowed without leave to amend.

The payment required on allotment is not a call.

Where the memorandum of association empowered the directors without further authority from the shareholders, to pay a specified sum for the cost and expenses of the pro-

GIFT OVER.

motors—*Held*, on demurrer, that a payment without taxation was not improper. *Croskey v. The Bank of Wales* 314

2. The plaintiff, a certificated bankrupt who had compounded with his creditors, filed a bill impeaching a purchase from his assignees of part of the property by the solicitor to his assignees; but, from his cross-examination in Court it appearing in the opinion of the Court that the composition was fraudulent, and that after his bankruptcy he had himself purchased some of his real estate vested in his assignees, and had sued for and recovered for his own benefit moneys due to him at the time of his bankruptcy, and not entered in his schedule or accounted for to his assignees or creditors, the Court dismissed the bill, but without prejudice to the rights of the assignees. *Adams v. Swarder* 287

3. An heir-at-law cannot maintain a bill in the Court of Chancery to set aside, on the ground of fraud, a will devising real estates. *Jones v. Gregory.* 468

See ADMINISTRATION.
PRIVILEGED COMMUNICATION.
FORFEITURE.
QUASI TRUSTEE.

FURNITURE.

See WILL, 3.

GIFT.

See FATHER AND CHILD.

GIFT BY IMPLICATION.

See WILL, 4.

GIFT OVER.

See FORFEITURE.

INDEMNITY.

GIFT TO SOLICITOR.

See SOLICITOR AND CLIENT, 2.

GOODS.

See LIEN.

GOOD CONSIDERATION.

See POST NUPTIAL SETTLEMENT.

GROWING CROPS.

See LEASE.

GUARDIAN.

See FATHER AND CHILD.

LEASE.

WILL, 2.

HEIR.

See FRAUD, 3.

QUASI TRUSTEE.

HUSBAND AND WIFE.

See BREACH OF TRUST, 2.

COVENANT TO SETTLE.

FORFEITURE.

MARRIAGE SETTLEMENT, 1, 2.

POST NUPTIAL SETTLEMENT.

SETTLEMENT, 1, 2.

IMPROVEMENTS.

See QUASI TRUSTEE.

IMPROVED PRICE.

See SUB-PURCHASER.

INCOME.

See WILL, 4.

INDEMNITY.

In an administration suit, the order of the Court is an indemnity to the executors.

INQUIRY.

727

In an administration suit, executors claimed to retain part of the residue as an indemnity against possible liability in respect of mining shares. The Court refused the claim, but required the residuary legatees to undertake to answer such liability. *Williams v. Headland* 505

INDIA.

See PENSION.

INDORSEMENT.

See ORDER AND DISPOSITION, 1.

INDULGENCE.

See ACCOUNT, 2.

INFANT.

See LEASE.

MARRIAGE SETTLEMENT, 2.

SOLICITOR.

INFLUENCE.

See FATHER AND CHILD.

POST-NUPTIAL SETTLEMENT.

INJUNCTION.

See ACCOUNTS.

COPYRIGHT.

DEPOSITED PLANS.

DIVERSION (PERMANENT) OF ROAD.

JUDGMENT CREDITOR.

LANDLORD AND TENANT, 1.

LOCAL GOVERNMENT.

OFFICE COPY.

STAY OF PROCEEDINGS.

INJURY AS TO DAMAGES.

See SPECIFIC PERFORMANCE, 3.

INQUIRY.

See SPECIFIC PERFORMANCE, 1.

728 INVESTIGATION.

INSOLVENCY.

See PARTNERSHIP.

INSPECTORS.

See ACCOUNT, 2.

INSUFFICIENT STATEMENT
OF CLAIM.

See UNTRUE AVERMENT.

INSURANCE COMPANY.

See MISREPRESENTATION.

INTENTION.

See WILL, 1.

INTEREST.

See BUILDING CONTRACT.
WILL, 4.

INTERIM INVESTMENT.

See INVESTMENT.

INTERVENTION OF INDE-
PENDENT SOLICITOR.

See SOLICITOR AND CLIENT, 1.

INVALID SALE.

See SOLICITOR AND CLIENT, 1.

INVALID WILL.

See QUASI TRUSTEE.

INVENTION.

See PATENT.

INVESTIGATION.

See SPECIFIC PERFORMANCE, 2.

LANDLORD AND TENANT

INVESTMENT.

Where land was taken by a railway company under the compulsory powers of their own Acts, with which the Lands Clauses Consolidation Act was incorporated—*Held*, that under the 80th section of the latter Act the company were bound to pay the costs of the petition for interim investment. *Re Shuttleworth's Estate Act.* 87

JOURNAL.

See COPYRIGHT.

JUDGMENT CREDITOR.

1. On a bill by a judgment creditor of a mortgagor, the Court granted an injunction to restrain mortgagees who were about to sell under their power from paying the surplus to the mortgagor.

The statute, sec. 1, does not apply to an equity of redemption. *Semble. Thornton v. Finch.* 515

See ACCOUNT, 3.

JURISDICTION.

See ACCOUNT, 1.

ADMINISTRATION.

BUILDING CONTRACT.

LANDLORD AND TENANT.

The plaintiff took, and was let into, possession of land, for the purpose of building according to a plan agreed upon and at a rent fixed, without any agreement in writing, and without any parol agreement for a lease for a term of years; after which the plaintiff expended a considerable sum in buildings according to the plan, and continued in possession for several years, and duly paid the rent verbally fixed.

LEASEHOLD.

The defendant, as landowner, having brought an action of ejectment, insisting that the plaintiff was merely tenant at will—*Held*, that the plaintiff was entitled to an injunction, and to relief in equity.

The bill prayed in the alternative for a lease, or for compensation. A private Act of Parliament having authorised leases for a certain duration, and on certain specified terms, to be granted in cases nearly similar where there was no written agreement, and it having been the usage on the estate to double the rent when a lease was executed, the Court decreed a lease to the plaintiff according to the Act of Parliament, and at the double rent.

The decision in *Pilling v. Armistage*, 12 Ves. 78, not applicable to the case of a tenancy created for the express purpose of expenditure by the tenant in building. *Thornton v. Ramsden*. 519

LEASE.

Bill to rectify a lease of infant's property sanctioned by the Court, in pursuance of an agreement, by excluding certain trade fixtures alleged to have been improperly comprised in the lease, and also by expunging the covenant as to delivery up of possession of growing crops and other particulars, dismissed with costs, there being no evidence that the lease was inconsistent with the agreement, one of the lessees being the infant's guardian. *Seaton v. Staniland*. 61

LEASE SANCTIONED BY THE COURT.

See LEASE.

LEASEHOLD.

See MISTAKE.

LIMITS OF DEVIATION. 729

LEAVE TO AMEND.

See AMENDED INCONSISTENT BILL.
UNTRUE AVERMENT.

LEGACIES.

See ACCOUNT, 4.
WILL, 6.

LESSEE.

See SPECIFIC PERFORMANCE, 1.

LESSOR.

See EJECTMENT.

LESSOR AND LESSEE.

See SPECIFIC PERFORMANCE, 1.
EJECTMENT.

LIABILITY.

See LOSS BY EXECUTOR.

LIEN.

1. Where a debtor gave authority by parol to his creditor to take certain goods, passing by delivery, and sell them, and out of the proceeds to retain his debt—*Held*, that the creditor against the administrator of the debtor had a lien on such goods to the extent of his claim. *Gurnell v. Gardner*. 626

See ORDER AND DISPOSITION, 2.
SOLICITOR AND CLIENT, 3.

LIFE ESTATE.

See BREACH OF TRUST, 2.

LIFE INTEREST IN WIFE.

See WILL, 4, 5.

LIMITS OF DEVIATION.

See DEPOSITED PLANS, 2.

730 LOSS BY EXECUTOR.

LINE OF STREET.

See LOCAL GOVERNMENT.

LOCAL BOARD OF HEALTH

See LOCAL GOVERNMENT.

LOCAL GOVERNMENT.

The owner of a factory, being desirous of rebuilding his premises, submitted the plans, &c., to a committee, to whom the Town Council, also the Local Board of Health, delegated their powers, and the plans having been approved, pulled down the factory, and proceeded to rebuild it according to such plans. The Town Council, under the 35th section of the Local Government Act, 1858, relating to buildings to be erected, having required the plaintiff to set back his premises, the Court restrained them by injunction from interfering with the erection of the factory according to the approved plans. *Slee v. Corporation of Bradford.* 262

LOCKE KINGS' ACT.

See WILL, 1.

LODGING.

See ACCOUNT, 3.

LOSS BY EXECUTOR.

On a bill by a *cestui que trust* against trustees and executors to make them liable for loss alleged to have been sustained by the sale of the testator's business and stock in trade against the will of the plaintiff, to one person instead of another, who, he alleged, would have made a higher offer, the Court held that, the trustees having acted with due deliberation, and in the honest ex-

MARRIAGE SETTLEMENT.

ercise of their discretion, the trustees were not liable, and gave them their costs of the suit. *Selby v. Bowie.* 300

LUNACY.

See ADMINISTRATION.

MANUFACTURE.

See PATENT.

MARRIAGE.

A suitor wrote to the mother of the young lady as follows:—"If your daughter has or may have money, my wish and intention would be that it should be settled for her sole and separate use." Consent to the marriage having been given, in the faith that the intention thus expressed would be fulfilled, and the marriage having taken effect without a settlement, the Court ordered the wife's property to be settled in the usual way, and the costs of the suit and of the settlement to be paid out of the fund. *Alt v. Alt.* 84

See SETTLEMENT.

MARRIAGE SETTLEMENT.

1. A settlement made by a woman of her personal property after her engagement to be married set aside at the suit of the husband, although he was told before the marriage that she had executed a settlement affecting her property. It appearing that neither she herself nor her husband was accurately informed of the nature and effect of the trusts of the settlement—*Held*, that the doctrine of constructive notice of the contents of an instrument was not sufficient to bind the husband on the ground of acquiescence.

Suppression of the truth, or misrepresentation of a material fact,

MISREPRESENTATION.

will vitiate any contract or gift the validity of which depends upon the truth and accuracy of the representation on which it was made. *Prideaux v. Lonsdale.* 159

2. Where the draft of a proposed settlement in contemplation of the marriage of an infant ward of Court containing a covenant to settle after-acquired property, but no provision as to a second marriage, was approved by the intended husband but never executed, though a post-nuptial settlement in different terms was executed, the Court varied the latter settlement by adding the covenant as to after-acquired property. *Re Hoare's Trusts.* 254

MARRIED WOMAN, 1.

See SETTLEMENT.

MARRYING AGAIN WITHOUT CONSENT.

See FORFEITURE.

MILITARY PENSION.

See PENSION.

MINING SHARES.

See INDEMNITY, 1.

MINOR.

See POST NUPTIAL SETTLEMENT, 1.

MISREPRESENTATION.

A policy of insurance on the life of T., which one insurance company induced another, by way of reinsurance, to effect on the representation that they intended to retain part of the risk, which, however, they subsequently got rid of by a further reassurance—Declared void.

MOTION.

731

Jorden v. Money, 5 H. of L. C. 185, considered. *Trail v. Baring* 485

See FRAUD, 1.

MARRIAGE SETTLEMENT, 1.

MISTAKE.

A vendor, being a lessee of a house with a right of purchase, agreed to sell the fee simple and inheritance for 2500*l.*, and assigned his lease and contract to purchase to the purchaser, who by mistake covenanted to perform the covenants in the lease. It appearing that one-fourth of the property was leasehold, and the vendor having brought an action for the purchase-money—On bill filed by the purchaser, the Court set aside the contract.

On a bill to set aside a written instrument on the ground of mistake or surprise, parol evidence is admissible to show that such instrument is contrary to the real terms of the contract, and that it ought to be set aside. *Price v. Ley.* 235

MORTGAGE.

See BREACH OF TRUST, 1.

ORDER AND DISPOSITION, 1, 2.

PROFESSIONAL ADVISER.

WILL, 1.

MORTGAGEES.

See JUDGMENT CREDITOR.

PROFESSIONAL ADVISER.

MORTGAGOR.

See JUDGMENT CREDITOR.

MOTION.

See OFFICE COPY.

PRODUCTION.

STAY OF PROCEEDINGS.

732 ORDER AND DISPOSITION. PARTNERSHIP.

NEXT OF KIN.

See UNTRUE AVERMENT.

NOTICE.

See EJECTMENT.

MARRIAGE SETTLEMENT, 1.

OFFICE COPY.

An *ex parte* injunction obtained on an affidavit, of which no office copy was in court at the time of making the motion, dissolved with costs. *Elsev v. Adams.* 398

OFFICER.

See PENSION.

OPENING FORECLOSURE DECREE.

Demurrer to a bill for redemption after a foreclosure decree, which the bill asked to open only as to one of the four parties to the decree, allowed with costs, and leave to amend refused. *Patch v. Ward.* 96

ORDER.

See CHARGE ON LAND.
CHARGING ORDER.

ORDER AND DISPOSITION.

1. Where the registered mortgagees of three fishing boats deposited the mortgage deeds with their bankers as security for a debt, and afterwards became bankrupt—*Held*, that the statutory form of assignment being by indorsement, the mortgages could not be dealt with by the bankrupts, and therefore were not in their order and disposition.

A bill of sale by a trader of all his stock-in-trade to secure an ante-

cedent debt and all future advances is an act of bankruptcy. *Lacon v. Liffen.* 75

2. Where the plaintiff advanced moneys on a vessel in process of construction on an agreement that the vessel was to be assigned to him (which was done), and that such advance was to be a charge on the vessel—*Held*, that on the bankruptcy of the ship-builder, while they were building the vessel, she was not in the order and disposition of the bankrupts, and that the plaintiff's lien for the moneys advanced was not destroyed by the bankruptcy. *Swainston v. Clay.* 187

ORDER OF COURT.

See INDEMNITY.

PARENT.

See FATHER AND CHILD.

PAROL AGREEMENT.

See LANDLORD AND TENANT.

PAROL AUTHORITY.

See LIEN.

PAROL EVIDENCE.

See MISTAKE.

PARTIES.

See OPENING FORECLOSURE DECREE.

PARTNERSHIP.

Where one of two partners died and the other soon afterwards became bankrupt, the joint estate being administered in bankruptcy, and the separate estate of the solvent

partner in this court—*Held*, that the joint creditors who were part paid in bankruptcy were not entitled to prove against the separate estate of the solvent partner *pari passu* with the creditors of the solvent partner.

Where a joint creditor takes the benefit of a decree for administering the estate of the insolvent partner and obtains an order for payment of his debt and costs, the executors' costs are prior charges, but where the executors have denied assets their costs are postponed to the debt and costs of the joint creditor. *Lodge v. Pritchard*. 294

See WILL, 6.

PATENT.

Inventions in mechanics are as totally different from inventions in economical chemistry as the laws and operations of mechanical powers differ from the laws of chemical affinities and the results of analysis in the comparatively infant science of chemistry, with its boundless field of undiscovered laws and substances. Where, therefore, prior to the date of an inventor's patent something necessary for the useful application of a chemical discovery for manufacturing purposes remained to be discovered, which the plaintiff's invention supplied—*Held*, that the manufacture, with the materials and process in the specification, was a "new manufacture not in use" at the date of the patent.

The law recognises the right of an inventor who finds out and supplies for commercial purposes an article known previously only as a chemical curiosity.

This Court looks with distrust on experiments conducted with a view to litigation. *Young v. Fernée*. 577

PAYMENT.

See ACCOUNT, *passim*.
FRAUD, 1.

PAYMENT OF MONEY.

See CHARGE ON LAND.

PAYMENT WITHOUT TAXATION.

See FRAUD.

PENSION.

The Statutes of the 46 Geo. 3, c. 69, & 47 in Geo. 3, c. 25, do not apply to pensions granted by the government of India to military persons employed in India for the purpose of the Indian government. Therefore an assignment by an officer in the service of the East India Company, who, under the Transfer Act, 1858, became a colonel in the Queen's service and retired on his pension of 450*l.*, and an annuity of 200*l.* per annum, and afterwards assigned the same as security for a debt—*Held*, valid. *Carew v. Cooper*. 619

PERSONAL ESTATE.

See VOLUNTARY SETTLEMENT.

PERSONAL PROPERTY.

See MARRIAGE SETTLEMENT, 1.

PICTURES.

See WILL, 3.

PLANS.

See DEPOSITED PLANS, 1, 2.
LOCAL GOVERNMENT.

PLATE.

See WILL, 3.

POLICY OF ASSURANCE.

*See MISREPRESENTATION.
SURETY.*

POST NUPTIAL
SETTLEMENT.

1. Bill by a divorced wife who had married again, to set aside a post-nuptial settlement, executed while a minor, but subsequently confirmed, for the benefit of the wife for life for her separate use, remainder to her (first) husband for life, remainder among the children of the marriage, in default of children who attained twenty-one as the wife should appoint; with a proviso, if the husband and wife should live separate and the wife should require alimony, that the wife's interest under the settlement should cease—Dismissed with costs so far as it sought to set aside the whole settlement, but the Court declared the proviso void. *Merryweather v. Jones.* 509

2. Bill by an expectant heir to set aside a post-nuptial settlement of real estate in expectancy, to trustees for his wife for life, remainder to pay annually 500*l.* to the children, remainder to herself for life, made while he was indebted, and on the suggestion of his wife's mother—Dismissed without costs.

The principle on which this Court acts in discouraging mortgages, sales, and dealings with expectant heirs of reversionary interests, has no application to a settlement by an heir in favour of his wife and children. *Shafto v. Adams.* 492

*See MARRIAGE SETTLEMENT, 1.
SETTLEMENT, 2.*

PRACTICE.

*See PRODUCTION.
SUBPURCHASE.*

PRODUCTION.

PRESSURE.

The assent which is necessary to the validity of an agreement in this court must be an assent, uninfluenced by any power which the one party may have of operating on the fears of the other: therefore where an agreement was executed by the one party, the plaintiff, under a threat by the other that the plaintiff's son would, otherwise, be indicted for forgery it was set aside with costs.

Where the plaintiff's main and influencing purpose for entering into the agreement was to relieve his son from exposure, disgrace, and ruin, the intervention of other circumstances or collateral advantages to himself are not enough to sustain the agreement in this court. *Bayley v. Williams.* 638

PRINCIPAL.

See SURETY.

PRINCIPAL AND AGENT.

*See ACCOUNT, 5.
PRODUCTION.*

PRIVILEGED COMMUNI-
CATION.

Demurrer by a solicitor to produce letters written to him by his client about the time and in respect of a matter impeached by a bill as fraudulent, to which the solicitor was not made a party, nor charged with fraud—Allowed. *Charlton v. Combes.* 372

PROBATE COURT.

See CHARGE ON LAND.

PRODUCTION.

The defendant in a suit instituted against him as agent for an account,

PUBLIC ROAD.

moved that certain accounts alleged in the bill to contain false entries might be produced, on an affidavit, that the vouchers were lost, and that he could not otherwise put in a sufficient answer. — The motion was refused with costs.

Taylor v. Heming, 4 Beav. 235, considered. *Turner Burckinshaw* 399

PROFESSIONAL ADVISER.

Where the professional adviser of the plaintiff being aware of the extent of her fortune and of the influence possessed over her by her brother-in-law (his debtor) took securities to a large amount to secure his debt the Court set them aside and made the defendant pay the costs of the suit. *Rhodes v. Bate*. 670

PROFESSIONAL RELATION.

See SOLICITOR AND CLIENT.

PROFITS.

See SPECIFIC PERFORMANCE, 2.

PROOF.

See PARTNERSHIP, 1.

PROVISO.

See SETTLEMENT, 2.

PROVISO FOR ALIMONY.

See POST NUPTIAL SETTLEMENT, 1.

PUBLICATION.

See COPYRIGHT.

PUBLIC ROAD.

See DEPOSITED PLANS, 1.

RAILWAY COMPANY. 735

PURCHASE.

See SOLICITOR AND CLIENT, 1.

PURCHASE-MONEY.

See DEPOSIT.

PURCHASER.

See SPECIFIC PERFORMANCE, 2, 3.

QUASI TRUSTEE.

The executor, who was also named as devisee in a will, not attested so as to pass real estate, entered into possession of the real estate, expended his own moneys in improvements, and died intestate. His administratrix took a transfer to herself of a mortgage on the estate, and claimed it as assets under an alleged arrangement with the testator's widow, that her husband took the estate in discharge of a debt due from the testator. On a bill, filed by the testator's heiress, the Court held that the executor must account for the rents from the testator's death, with an allowance for permanent improvements.

Nanney v. Williams, 22 Beav. 452 — 469, followed. *Pelly v. Bascombe*. 390

RAIL.

See EXECUTION.

RAILWAY.

See EXECUTION.

RAILWAY CLAUSES ACT.

See DEPOSITED PLANS.

DIVERSION (PERMANENT) OF ROAD.

RAILWAY COMPANY.

See INVESTMENT.

WILL, 5.

REPAIRS.**REAL ESTATE.***See CHARGING ORDER.**QUASI TRUSTEE.**See SETTLEMENT.**WILL, 1, 2, 5.***REBUILDING.***See LOCAL GOVERNMENT.***RECEIPTS AND PAYMENTS.***See ACCOUNT, 5.***RECTIFICATION.***See MARRIAGE SETTLEMENT, 2.*
*LEASE.***REDEMPTION.***See OPENING FORECLOSURE*
*DECREE.***REFORMATION OF AGREEMENT.***See MISTAKE.***REFUSAL.***See ACCOUNT, REFUSAL TO.***REGISTERED MORTGAGEES OF SHIPS.***See ORDER AND DISPOSITION, 1, 2.***RELIEF AT LAW.***See STAY OF PROCEEDINGS.***RENT.***See LANLORD AND TENANT.***REPAIRS.***See EJECTMENT.**SPECIFIC PERFORMANCE, 1.***SALE.****REPRESENTATION.***See SPECIFIC PERFORMANCE, 2.***RESALE.***See SUBPURCHASE.***RESCINDING CONTRACT.***See MISTAKE.**SPECIFIC PERFORMANCE, 3.***RESIDUE.***See INDEMNITY.**WILL, 2, 4.***RESIDUARY DEVISE.**

A devise of residuary real estate still specific, notwithstanding Wills Act, 7 Will. 4, and 1 Vict. c. 26. *Eddells v. Johnston*, 1 Giff. 29, and *Pearman v. Twiss*, 1 Giff. 130, followed. *Clark v. Clark.* 702

RESIDUARY LEGATEE.*See ACCOUNT, REFUSAL TO.*
*INDEMNITY.***REVERSIONARY INTEREST.***See COVENANT TO SETTLE.***ROAD.***See DIVERSION (PERMANENT)*
*OF ROAD.***SALE.***See ACCOUNT, 4.**DEPOSIT.**JUDGMENT CREDITOR.**LOSS BY EXECUTORS.**SOLICITOR AND CLIENT.*

SETTLEMENT.

SALE UNDER DIRECTION OF COURT.

See SETTLED ESTATES ACTS, 1854-1856, 90.

SECOND MARRIAGE.

See MARRIAGE SETTLEMENT.

SECURITY.

See PENSION.

SECURITIES.

See PROFESSIONAL ADVISER.

SEPARATE ESTATE.

See PARTNERSHIP.

SEPARATE USE.

See MARRIAGE SETTLEMENT.

SETTING BACK BUILDINGS.

See LOCAL GOVERNMENT.

SETTLEMENT.

1. Where a married woman, who prior to her marriage was entitled under a will to a debt payable after the death of her sister, secured on land by the deposit of title deeds, by deed acknowledged joined her husband in assigning her share and interest in the said debt, and the said real security, in order to secure moneys due by her husband—*Held*, in a suit to administer the testator's estate, that she was not entitled to a settlement out of the proceeds of the real estate. *Williams v. Cooke*. 343

2. A fund in court not reduced into possession accruing in right of the wife, on whose marriage no settlement was made, and who was divorced by a colonial court at the suit of the husband—*Held*, to belong to the wife

SOLICITOR AND CLIENT. 737

as against a mortgagee of her husband, and also as against her children claiming a settlement. *Heath v. Lewis*. 665

See COVENANT TO SETTLE.

MARRIAGE.

MARRIAGE SETTLEMENT, 1, 2.
POST-NUPTIAL SETTLEMENT,
1, 2.

SURETY.

VOLUNTARY SETTLEMENT.

SHARE.

See WILL, 4, 6.

SHIP.

See ORDER AND DISPOSITION, 1, 2.

SOLICITOR.

Where a solicitor was employed by the next friend in establishing an infant's title to certain land, the infant having attained twenty-one, the Court, under the 23 & 24 Vict. c. 127, s. 28, declared on petition so much of the costs as remained unpaid a charge on the land recovered. *Bonser v. Bradshaw*. 260

See CHARGING ORDER.

SOLICITOR AND CLIENT.

SOLICITOR AND CLIENT.

1. A purchase by solicitors of the equity of redemption of their client's property set aside, although another solicitor had been called in, and the defendants had ceased to act as solicitors just before the contract for purchase: it appearing that the other solicitor had, with the knowledge of the defendants, not properly discharged his duty, and that the defendants had concealed from him an important fact.

The intervention of another soli-

citor or adviser who with the knowledge of the purchaser, neglects or does not properly discharge his duty, is not sufficient to support a purchase by his solicitor from his client. *Gibbs v. Daniel.* 1

2. A gift made by a client to his solicitor during the subsistence of the professional relation between them is invalid; therefore, where a client during the subsistence of such relation told his solicitor to retain a sum of 300*l.* out of moneys coming to the client, on a bill by the client, for an account the Court decreed a general account, with a direction that the defendants were not to be allowed the said 300*l.*, and ordered the defendants to pay the costs of the suit. *O'Brien v. Lewis.* 221

3. A solicitor who has acted for the plaintiff has a lien on costs under a decree for payment of the costs to his client after he has ceased to be solicitor in the cause, and although he has taken his client in execution for the costs. *O'Brien v. Lewis.* 396

See PRIVILEGED COMMUNICATION.

SOLID SILVER.

See WILL, 3.

SPECIFIC PERFORMANCE.

1. Where a lessor agreed to let a house and to put it in decorative repair, but refused to fulfil his contract, the Court at the instance of the lessee decreed specific performance of the agreement, with an inquiry whether the agreement as to decorative repair had been performed; and if not, decreed that the defendant should compensate the plaintiff in damages. *Samuda v. Lawford.* 42

2. Where the vendors of a brewery made various and inconsistent representations as to the profits of the concern which demanded investiga-

tion, for which the vendors afforded every facility, and which the purchaser in fact partially made, the Court decreed specific performance. *Clarke v. Mackintosh.* *Mackintosh v. Clarke.* 134

3. After a decree for specific performance of a contract to purchase for payment, and an attachment for default, on motion by the plaintiff the Court ordered the contract to be rescinded, and all proceedings stayed, except as to such application to this Court as might be made by the plaintiff to assess the damages occasioned by the breach of contract by the defendant.

Foligno v. Martin, 16 Beav. 586, followed. *Sweet v. Meredith.* 207

See MISTAKE.

SPECIFICATION.

See PATENT.

STATUTES.

See CHARGING ORDER.

46 GEO. 4, c. 69 . . .	619
47 GEO. 3, c. 25 . . .	619
7 GEO. 4, c. 111 . . .	333
3 & 4 WILL. 4, c. 27, s. 16 .	390
3 & 4 WILL. 4, c. 42 . . .	683
5 & 6 VICT. c. 45, s. 18 . .	632
8 VICT. c. 18, s. 80 (Lands Clauses Consolidation Act)	449
8 VICT. c. 20 (Railway Clauses Consolidation Act) . . .	
10 & 11 VICT. c. 34 . . .	262
11 & 12 VICT. c. 63 . . .	262
15 & 16 VICT. c. 688 . . .	688
17 & 18 VICT. c. 113 . . .	181
21 & 22 VICT. c. 98 . . .	278
— c. 106, ss. 39, 41 . . .	619
24 & 25 VICT. 134 . . .	622
23 & 24 VICT. c. 38 . . .	416
— c. 127, s. 28 . . .	622
25 & 26 VICT. c. 4 . . .	619
27 & 28 VICT. c. 112 . . .	515

SURETY.

STAY OF PROCEEDINGS.

Motion by a defendant before decree to restrain a co-defendant from prosecuting an action or to stay all proceedings in the suit on an affidavit that the relief sought by the bill and by the action was identical, refused with costs. *Russell v. The London, Chatham, and Dover Railway Company.* 403

See SPECIFIC PERFORMANCE, 3.

STOCK-IN-TRADE.

See LOSS BY EXECUTORS.

SUB-PURCHASE.

Where a sub-purchaser, at an improved price, applied by summons to be substituted in the place of his vendor (the original purchaser), who resisted the application, the Court refused to make the order, but, at the suggestion of the trustees, ordered a resale, on the terms that the original purchaser pay the improved price into court. *Re Settled Estates Acts, 1854 and 1856.* 90

SUB-PURCHASER.

See SUB-PURCHASE.

SUBSTITUTION.

See SUB-PURCHASE.

SUCCESSION.

See COVENANT TO SETTLE.

SUPPRESSION OF TRUTH.

See MARRIAGE SETTLEMENT, 1.

SURETY.

A surety is entitled to the benefit of the securities in the hands of the

TENANT FOR LIFE. 739

creditor. Therefore, where a creditor, whose debt was secured by the bond of the debtor and his surety as well as by a mortgage of the equitable life interest of the debtor and his wife in certain real estate and policies of assurance, assigned his debt, without notice by himself or the assignee, to the trustees of the settlement, who sold under a power—*Held*, that the surety was discharged to the amount of the security lost.

Where acquiescence is relied on, it must be shown that the person acquiescing was aware of the thing in which he acquiesced, and of the effect of such acquiescence.

Wheatley v. Bastow, 7 De G. M. & G. 261 and 271, considered. *Strange v. Fooks.* 408

SURPRISE.

See MISTAKE.

SURVIVING TRUSTEE.

See BREACH OF TRUST, 2.

SURVIVORSHIP.

See WILL, 2, 4.

TITLE DEEDS.

TEMPORARY DIVERSION OF ROAD.

See DIVISION (PERMANENT) OF ROAD.

TENANT AT WILL.

See LANDLORD AND TENANT.

TENANT FOR LIFE.

See ACCOUNT, 4.

COVENANT TO SETTLE.

TITLE DEEDS.

740 TRUST TO SELL.

TENANTS IN COMMON.

See WILL, 2.

THREAT.

See PRESSURE.

TITLE DEEDS.

Devise of residuary real estate to trustees upon trust to permit testator's sister-in-law, if single, to receive the rents for life without power of anticipation, but, if either should marry or die, then the single one or survivor to take the whole, but if both married, on trust to sell and divide the proceeds among testator's nephews and nieces. The title deeds having passed into the possession of the tenant for life, on a bill filed by the trustees, the Court having refused to disturb the custody of the deeds. *Taylor v. Sparrow*, 703.

See ORDER OF DISPOSITION, 1.
SETTLEMENT, 1.

TOWN COUNCIL.

See LOCAL GOVERNMENT.

TOWNS IMPROVEMENT.

See LOCAL GOVERNMENT.

TRADE FIXTURES.

See LEASE.

TRANSFER ACT.

See PENSION.

TRUST SO SELL.

See ACCOUNT, 4.

VENDOR AND PURCHASER.

TRUSTEES.

See ACCOUNT, 2, 4.

ACCOUNT, REFUSAL TO.
BREACH OF TRUST, 1, 2.
LOSS BY EXECUTORS.
TITLE DEEDS.

TRUSTS.

See SETTLEMENT.

MARRIAGE SETTLEMENT.
WILL, 1.
ACCOUNT, 4.

ULTRA VIRES.

See DEPOSITED PLANS, 1, 2.

UNDUE INFLUENCE.

See FATHER AND CHILD.
PROFESSIONAL ADVISER.
SOLICITOR AND CLIENT, 1, 2, 3.

UNTRUE AVERMENT.

Where the bill prayed that the rights of all parties interested might be declared, and set forth the testator's will and codicil, and averred that the defendant was untruly described in the codicil as testator's next of kin and heir-at-law, and that he had obtained probate on an untrue allegation that the executors were dead, there being no distinct averment of the character in which the plaintiff claimed—a demurrer was allowed with leave to amend. *Parker v. Nickson*. 306

See MISREPRESENTATION.

USEFUL FOR COMMERCE.

See PATENT.

VENDOR AND PURCHASER.

See DEPOSIT.

VESTING.

See WILL, 2.

VIADUCT.

See DEPOSITED PLANS, 1.

VOLUNTARY GIFT.

See FATHER AND CHILD.

VOLUNTARY SETTLEMENT.

A voluntary settlement of personal estate, executed in favour of a wife and children, after commission of a felony, but before and in fear of conviction—*Held* invalid against the Crown. *Re Saunder's Estate*. 179

VOUCHERS.

See PRODUCTION.

WARD OF COURT.

See MARRIAGE SETTLEMENT, 2.

WIFE.

See HUSBAND AND WIFE.
WILL, 4, 5.

WILL.

1. A bequest of all testators's personal estate to his executrix, subject to the payment of his just debts and funeral and testamentary expenses, was held, on the construction of the Act 17 & 18 Vict. c. 113, a sufficient manifestation of an intention that a real estate was not to be primarily liable to a mortgage debt.

Woolstencroft v. Woolstencroft distinguished. *Eno v. Tatham*. 181

2. A testator gave his residuary real and personal estate to trustees, upon trust as to one-third for his son and daughter as tenants in common ;

his son's share to be vested at twenty-four, and his daughter's on her marriage with consent of her guardians ; but in case his son should die under twenty-four without leaving issue, or his daughter without having been married with such consent as aforesaid, then in trust for the survivor.

The son having attained twenty-four, and the daughter twenty-one without being married—*Held* that they were entitled in equal moieties.

Booth v. Booth observed on. *West v. West*. 198

3. Bequest by testator of all the furniture (except plate and pictures) which might be in a house mentioned at his decease—*Held* to be confined to articles of solid silver, and not to include a plated service in the said house. *Holden v. Ramsbottom*. 205

4. Where a testator directed the annual interest of his residue to be divided into as many shares as there were living children of T. and L. W., share and share alike, as they should come of age ; and in case any one should die without children, his share to devolve on survivors successively, till the whole interest came into the hands of the grandchildren and great grandchildren of T. and L. W.—*Held*, that the children of T. W. living at his death were entitled to the income only, but that there was a gift by implication to these children absolutely, with a gift over of the share of any grandchild who had died without having had issue ; not absolutely, but according to the gift of the original share.

Where a testator, having granted an annuity to his widow, under his will directed that if she persisted in any claim on the residue of his property she was to forfeit the annuity—*Held*, the widow was not put to her election, but was entitled both to her dower and to the annuity. *Wetherell v. Wetherell*. 51

5. Where a testator devised land to his widow Mary for life, remainder to his son and Elizabeth his wife in fee, who, during the life of the tenant for life, conveyed the land by a deed not acknowledged to a railway company—*Held*, that the wife's interest was within the 7th section of the Lands Clauses Consolidation Act, and passed to the company. *Cooper v. Gostling.* 449

6. Where a testator, having claims against his firm, directed his proportion of capital invested in the business to be converted into cash, such cash to be paid over as realised (with the exception of certain bequests thereafter mentioned) to a charity, and requested his executors, as soon

as convenient after his decease, out of the capital employed in the business to pay the persons mentioned below the following sums &c., the Court held—

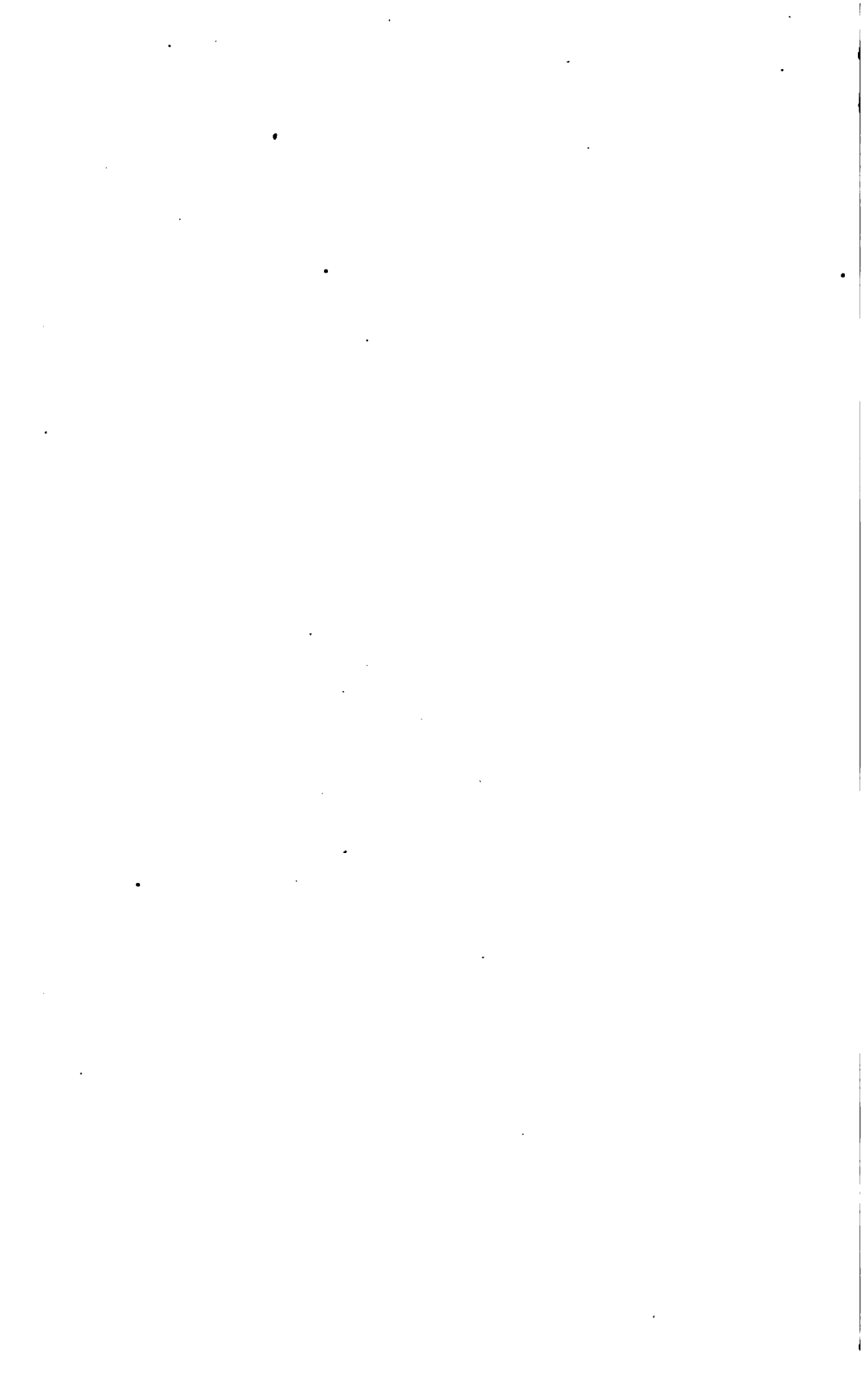
First, that the legacies were demonstrative, and not specific, and that if the particular fund failed the deficiency was payable out of the general personal estate not specially given.

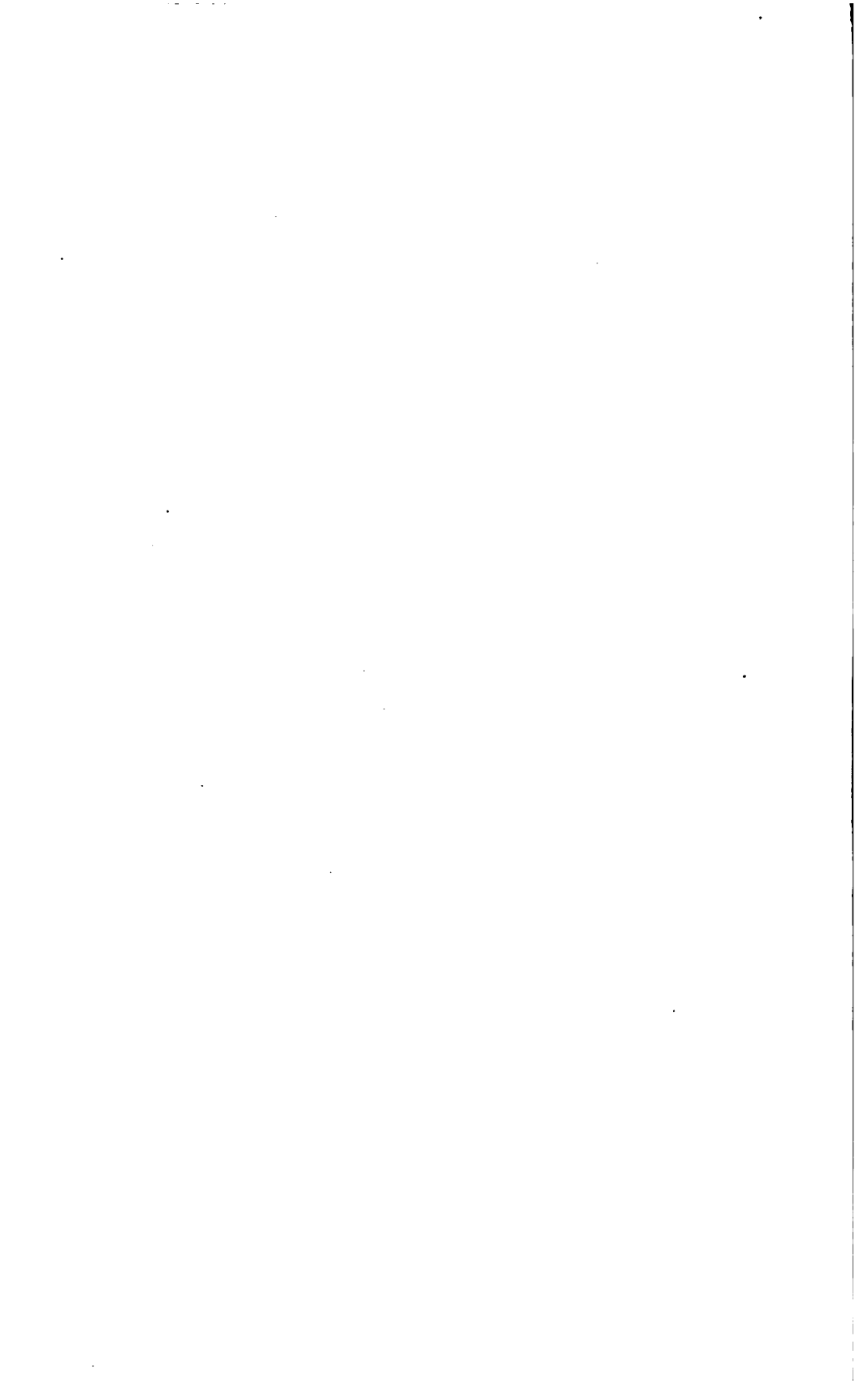
Secondly, that the proportion of capital included not only the testator's share in the assets, but also the debt due from the partner.

Smith v. Fitzgerald, 3 Ves. & B. 2, observed on. *Bevan v. The Attorney-General.* 361

See TITLE DEEDS.

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